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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. ~~140~~ 1044 ~~706~~ 292

CHARLES A. GREGORY ET AL.,
APPELLANTS,

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL.,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED ~~OCTOBER~~ November 21, 1888.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1440

CHARLES A. GREGORY ET AL.,
APPELLANTS,

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL.,
APPELLEES.

TABLE OF CONTENTS.

	PAGE
Bill of Complaint	1
Answer of Boston Safe Deposit and Trust Company	6
Replication to same	7
Answer of Merchants National Bank	7
Replication to same	9
Answer of Mary H. Pike, Executrix	9
Replication to same	19
Stipulation as to evidence	19, 227 and 228
Record of the case	229
Final Decree in Circuit Court	230
Bond to Party on Appeal	230
Clerk's Certificate	231
Opinion of Circuit Court	233

EVIDENCE FOR COMPLAINANTS.

Exhibit 1, — Record, etc., in Jones *v.* Swift, No. 2,632 Law Docket	22
Pleadings, etc., in same	22 to 28
Docket entries "	29
Deposition of George W. Butterfield	30
Exhibits A to J, annexed	48

Exhibit 2, — Deposition of Charles A. Gregory in No. 1,951, Equity, Gregory v. Stetson, in State Supreme Court 57
Exhibits A to I, annexed 83
" 3, — Release and Disclaimer, by plaintiff, Gregory, in No. 2,170, Equity, 94
" 4, — Motion to dismiss bill as against defendant, Swift, in same . 95
" 5, — Stipulation in same 95
" 6, — Record in Gregory v. Jones, No 2,486, Law Docket . . . 96

EVIDENCE FOR DEFENDANT, MARY H. PIKE.

Exhibit 7, — Cross Examination of Charles A. Gregory, in No. 2,170, Equity . 101
" 8, — Deposition of Frederic A. Pike, in same 107
Deposition of Frank H Williams, in same 121
Deposition of Charles F. Jones, in same 127
" 9, — Stipulation in same, Oct. 19, 1885 150
" 10, — " " " " 151
" 11, — Deposition of J. C. Kemp, in same 151
" 12, — " W. C N. Swift, in same 169
" 13, — " F. W. Gregory, in same 184
" 14, — Cross Examination of Charles A. Gregory, in same . . . 191
" 15, — Withdrawal of Motion to Dismiss, in same 205
Deposition of Charles N Fox 206
" Thomas H Talbot 215

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2424.

CHARLES A. GREGORY ET AL.

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL.

BILL OF COMPLAINT.

[FILED AUG. 6, 1887.]

To the Judges of the Circuit Court of the United States for the District of Massachusetts in the First Circuit, sitting in Equity:

Charles A. Gregory of the city of Chicago and State of Illinois, and a citizen of the said State of Illinois, and Charles F. Jones, formerly of the city of San Francisco in the State of California, but now of the city of Philadelphia in the State of Pennsylvania, and a citizen of said State of Pennsylvania, bring this, their bill of complaint, against the Boston Safe Deposit and Trust Company, a corporation duly established by law in Massachusetts, and a citizen of said State of Massachusetts, and the Merchants National Bank of Boston, a corporation duly established under the laws of the United States, and Mary H. Pike of Calais, in the State of Maine, and a citizen of said State.

And your orators complaining show that on or about the twentieth day of April, A. D. 1883, the said Jones received of Wm. C. N. Swift of New Bedford, Mass., several notes of hand, payable to himself; that among said notes one was for the sum of $20,334.60, dated April 20, 1883, payable in three years from date with interest; that this note was made and delivered to him by said Swift in ex

change for another note of same amount and time, signed by said Swift, and payable to the order of George W. Butterfield, and by him indorsed and surrendered to said Swift by said Jones at the time; that this note is the same which was afterward on the thirty-first day of July, 1883, passed over by said Jones or by said Butterfield to one Frederic A. Pike of Calais, Me., now deceased, and referred to in a contract between said Pike and said Butterfield, dated July 31, 1883, and hereby referred to; and your orators charge that said original Swift note of $20,334.60 then surrendered to said Swift was given or made by said Swift in part payment of the price of certain mining stock or property before belonging to Charles A. Gregory of Chicago, Ill.

And your orators show that they are informed and believe, and therefore aver, that the contract of July 31, 1883, between said Pike and Butterfield for the purchase by the latter of the former of his mining property in California, became inoperative and void by reason of the declination of the Union Trust Company of New York to deliver to said Butterfield the bonds of the May Lundy Mining Company of London, as provided in said contract, and that the said Pike thereupon ceased to have any right to retain the said Swift note as against the said Butterfield or your orator.

And your orators show that it was also provided by said contract of July 31, 1883, that in case the said Butterfield should fail to make the payment of the purchase money of said mining property stipulated to be made by him on or before the first day of January, 1884, that the said Pike might at his election reclaim and receive back from the Union Trust Company the deeds of conveyance which were to be lodged by him with said Trust Company, and thereby terminated the said contract and all further liability of either party to perform the same; and your orators show that said Butterfield did fail to pay the purchase money of said mining property as stipulated, and the said Pike did thereupon elect to terminate or vacate said contract, and did take back the deeds of conveyance of said mining property, and did thereafter treat said contract as rescinded by him, and offered said mining property for sale to other parties, by reason of all which the said Pike thereafter ceased to have any right to or claim or lien upon the said Swift note of $20,334.60, and

another like note of same date for $15,000, lodged with him July 31, 1887, by said Butterfield, either as against the said Butterfield or the said Jones, to whom said notes were made payable.

And your orators are informed and believe, and therefore aver, that after the said $20,334.60 Swift note of April 20, 1883, had been passed over to said Pike, July 31, 1883, it really belonged to the said Charles A. Gregory, subject to any rights gained by the said Pike thereto, if any, under said contract of July 31, 1883.

And inasmuch as said note was in terms payable to your orator, Jones, and was not negotiable, your orator, Jones, did, on or about the fourth day of December, 1884, execute an assignment of all his property to the said Gregory, including therein the said Swift notes, and in and by said instrument (which is hereby referred to) gave the said Gregory a power of attorney to collect the said Swift notes or institute legal proceedings for that purpose in his name, the said notes then being in the possession of the said Pike.

And your orators are informed and believe, and therefore aver, that on or about the eighth day of January, 1886, or shortly before the maturity of said note of $20,334.60, the said Pike and the said Gregory entered into an arrangement or agreement in writing, whereby it was provided that the said Swift note of $20,334.60, the ownership of which was in controversy between them, should be at once lodged with one Amos P. Tapley of Boston, there to remain until a certain suit in equity then pending between the said Gregory and Pike should be finally determined; and that as soon as said note should mature an action at law thereon should be brought against the maker, Swift, for the recovery of the same, the said action at law to be brought and prosecuted under the joint control and direction of Thomas H. Talbot as the attorney or representative of the said Pike, and of Francis A. Brooks as the attorney or representative of the said Gregory; and an action at law in the name of your orator, Jones, against the said Swift on said note was so brought and prosecuted jointly by said two attorneys as your orators believe, until the thirtieth day of November, 1886, when the said note of $20,334.60 and the other Swift note were transferred by the said Talbot and Brooks to the Hon. E. R. Hoar, to be awarded and delivered by him as arbitrator to whichever of the two, the said

Gregory or the said Pike, should, in his judgment, be entitled to the same.

And your orators are informed and believe that a hearing was begun before the said Hoar as arbitrator for determining the ownership of said notes, and that while said hearing was going on the said Pike died; and that after the death of said Pike, the said hearing was continued with the knowledge and approval of the legal representatives of the said Pike, and that the said arbitrator decided that the said notes belonged to the said Gregory and not to said Pike, subject, however, to a lien thereon of said Pike afterward discharged by said Gregory; and that said Brooks and Talbot placed said notes in the personal custody of John G. Stetson of Boston, Dec. 24, 1886, and afterward on or about the tenth day of January, A. D. 1887, took judgment against the said Swift in said action at law upon said $20,334.60 note (being No 2,632 of cases on the law calendar of this Court), and that the amount of said judgment was paid by the said Swift in satisfaction of said judgment and of said note of $20,334.60, and came into the hands of said John G. Stetson, Esq., who was also the clerk of said Court as well as the depositary of said note, the said judgment having been recovered in the name of your orator, Jones, as the plaintiff in said action.

And your orators show that the money so paid into the hands of the said Stetson, as clerk of the Court, in said action at law was afterward by the consent of the said Gregory and Pike (or $24,000 thereof) deposited with the defendant, the Boston Safe Deposit and Trust Company, and the residue with the Merchants National Bank, defendant.

And your orators show that by reason of the submission of the question of the ownership of said two notes to the determination of the Hon. E. R. Hoar, as arbitrator, and of the contemporaneous transfer of said notes to the possession of said arbitrator to be by him delivered to the person found by him to be entitled to the same, and of the decision of said Hoar in favor of said Gregory, and of the subsequent delivery of said note of $20,334.60 to the said Stetson by the said Gregory and Mary H. Pike, and of the payment of said note to said Stetson, as clerk of this Court, with the previous knowledge and consent of said Gregory and Mary H. Pike, and the subse-

quent deposit of the proceeds of said note with the two defendant corporations, the said corporations have, as your orators aver, become severally possessed of said moneys in trust for the use and benefit of said Gregory as the owner of said note.

And your orators pray for a decree of this Honorable Court that the said Gregory is entitled to receive the fund now being in the hands of the defendants, the Boston Safe Deposit and Trust Company and the Merchants National Bank, as the proceeds of said note of hand, less any lawful charges and deductions to be made therefrom; and that the Court will order the said sums to be paid to the said Gregory, and they pray for such other relief as they, or either of them, may be entitled to in the premises.

And your orators pray for usual process of subpœna to be directed to the said Boston Safe Deposit and Trust Company, the Merchants National Bank, and to Mary H. Pike, in case she shall come within the jurisdiction of this Court, commanding them and each of them to answer this bill of complaint, and abide and perform the decree of this Court to be made thereon; and inasmuch as the defendant, Mary H. Pike, does not reside within the District of Massachusetts, and cannot be served with process, unless she shall come within the district, your orators pray for an order of notice of the pendency of this bill, to be given to her either by publication or by personal service upon her as the Court may direct, in conformity with the statutes in such cases provided.

CHARLES A. GREGORY,
By F. A. BROOKS.
CHAS. F. JONES.

F. A. BROOKS,
Solicitor for the Orators.

ANSWER OF THE BOSTON SAFE DEPOSIT AND TRUST COMPANY.

[Filed Sept. 30, 1887.]

The Boston Safe Deposit and Trust Company, by its president, Frederick M. Stone, for answer to the bill of complaint herein filed, says: —

That on the twenty-sixth day of March, A. D. 1887, John G. Stetson, in his capacity as clerk of this Court, deposited in the possession of said Trust Company the sum of twenty-four thousand dollars in the name of the Circuit Court, John G. Stetson clerk, upon the special trust that this defendant should securely hold said sum and pay the same to whomever said Circuit Court should direct, by an order in writing signed by the clerk of said Court and countersigned by one of the justices thereof; that it still holds said sum upon said trust, and is ready to pay over the same under the instruction of this Court, less its reasonable charges, expenses and costs in this behalf incurred.

And so far as the preceding answer admits any allegations of said bill, the same are admitted; and as to the remaining allegations thereof, this defendant neither admits nor denies them, but leaves the complainants to prove them.

And it requests the judgment and instruction of the Court herein, and submits itself thereto, and asks for its costs.

BOSTON SAFE DEPOSIT AND TRUST CO.,
By F. M. Stone, *President.*

Commonwealth of Massachusetts,
Suffolk, ss. Boston, Oct. 3, 1887.

Then personally appeared before me, a notary public for said county of Suffolk, Frederick M. Stone, and made oath that the statements contained in the foregoing answer were true.

[seal] John W. Shepard,
Notary Public.

REPLICATION.

[Filed Oct. 15, 1887.]

The Replication of Plaintiffs to the Answer of the Boston Safe Deposit and Trust Company, *Defendant.*

These replicants for replication to said answer say they will aver and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the answer of said Trust Company is uncertain and insufficient to be replied unto.

By their Solicitor,

F. A. BROOKS.

ANSWER OF THE MERCHANTS NATIONAL BANK OF BOSTON.

[Filed Sept. 30, 1887.]

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit and advantage which can or may be had, by exception or otherwise, to the manifold errors, uncertainties and insufficiencies in the plaintiffs' bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for it to make answer unto, answering says: —

This defendant denies that any money has been placed in its hands and possession as the proceeds of any note of $20,334.60, or of any other sum, made by Wm. C. N. Swift, or as the proceeds of any judgment on said note, or as money in which the plaintiffs or either of them have, or claim to have, any title or interest.

This defendant is, and for a long time past hath been, a legal depositary of public moneys of the United States of America, and has, as such depositary, given security as required by law, and it denies that any money received in satisfaction of the judgment upon the note for $20,334.60, mentioned in the plaintiffs' bill, has been deposited with this defendant, unless the same has been deposited with this defendant to the credit of an account standing upon its

books in the name of the Circuit Court of the United States, the amount standing to the credit of which account, at the close of business on Saturday of every week, and on the last business day of every month this defendant is required to report, and does report and has reported, to the Secretary of the Treasury, and to the Treasurer of the United States; and said defendant says that amounts standing to the credit of said account can be paid out only on check drawn by order of said Circuit Court, signed by the clerk or deputy clerk of said Court, and approved by a Judge. And upon this matter said defendant will insist, and prays that it may have the same benefit therefrom as if it had pleaded the same specially to said bill, and humbly prays judgment of the Court whether it can or shall be compelled to make further answer in the premises.

And to all other matters and things in said bill alleged and set forth, this defendant is a stranger, and hath neither knowledge, information nor belief thereof, and so can neither admit nor deny, but will leave the plaintiffs to prove the same, if material.

Wherefore, this defendant prays to be hence dismissed, and for its costs in this behalf most wrongfully sustained.

[SEAL] THE MERCHANTS NATIONAL BANK,
By FRANKLIN HAVEN, Jr.,
President.

L. S. DABNEY,
Solicitor.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

The answer of the defendant, The Merchants National Bank of Boston, was this day taken before me at Boston in said county, under the common seal of said corporation, as by their said seal affixed appears.

Witness my hand and notarial seal at said Boston this twenty-ninth day of September, in the year eighteen hundred and eighty-seven.

[SEAL] EDWIN N. HILL,
Notary Public.

REPLICATION.

[Filed Oct. 15, 1887.]

The Replication of the Plaintiffs to the Answer of the Merchants National Bank, *one of the Defendants.*

These repliants, for replication to the answer of the said Merchants National Bank, say they will aver and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto; and that said answer of said bank is uncertain, untrue and insufficient, without this, that any matter or thing in said answer contained material to be replied to, traversed or denied, is true.

By their Solicitor,

F. A. BROOKS.

ANSWER OF MARY H. PIKE, EXECUTRIX.

[Filed Dec. 8, 1887.]

Now comes Mary H. Pike of Calais, in the State of Maine, a citizen of said State of Maine, executrix of the last will and testament of Frederic A. Pike, late of said Calais, now deceased, said Mary H. Pike being one of the defendants in the above entitled cause, and for answer to the bill of complaint of the plaintiffs filed therein, says as follows: —

I.

The original Swift note for $20,334.60, mentioned by the complainants, was not given in payment, in part or in whole, of the price of certain mining stock, which at the time of the making of said note, or at the time of the purchase of said stock by said Swift, belonged to the complainant, Gregory. On the other hand, before such purchase, said mining stock had been by said Gregory sold and transferred to one George W. Butterfield, mentioned in said bill of complaint, and was the lawful property of said Butterfield, until it was by him sold and transferred to said Swift, upon the considera-

tion of certain notes, which being afterwards exchanged with said Swift, the note for $20,334.60, mentioned in the plaintiffs' bill of complaint, was one of the notes taken in said exchange.

Said earlier notes were made payable to said Butterfield, and by him indorsed and delivered to the plaintiff, Jones, and by the said plaintiff, Jones, indorsed and delivered as paid notes to said Swift. And the notes in said exchange, taken by said Jones, were made payable to said Jones alone, including the note for $20,334.60, mentioned in the plaintiffs' bill of complaint.

II.

The contract mentioned in the plaintiffs' bill as entered into by said Frederic A. Pike and said George W. Butterfield on the thirty-first day of July, 1883, was in renewal or extension of a contract for the same general purpose and to the same general effect entered into by said Butterfield with said Frederic A. on the twenty-ninth day of January in the same year, which contract expired on the thirtieth day of July in that year; and said Butterfield and one John C. Kemp, or John C. Kemp Van Eé, and the plaintiff, Charles F. Jones, and also the plaintiff, Gregory, were in partnership together, sharing, in proportions agreed by and between them, in the benefits to accrue under said contract of Jan. 29, 1883; and said Butterfield, Kemp, Jones and Gregory were also partners sharing in the same proportions so agreed in the renewal or extension of that contract which was made July 31, 1883; that is, were partners in said proportions in the benefits which were to accrue under said contract of July 31, 1883, said Gregory, as well as said Kemp, being partners with said Butterfield and said Jones under both said contracts, that of Jan. 29, and that of July 31, 1883.

III.

The mining stock mentioned in the plaintiffs' bill of complaint, as before said sale to said Swift, having belonged to the plaintiff, Gregory, was, before said sale by said Gregory, sold and transferred to said Butterfield for the purpose of raising money on promissory notes to be used in the promotion of the enterprise of obtaining the

right to sell the mining property which was the subject of both said contracts with said Frederic A. Pike, to wit, of Jan. 29, and July 31, 1883.

Said note for $20,334.60 was indorsed and delivered to said Frederic A., under said last-named contract, with the previous knowledge and previous consent of said Gregory, and also with such knowledge and consent immediately subsequent to said indorsement and delivery.

IV.

Said contract of July 31, 1883, between said Butterfield and said Frederic A., did not become inoperative by reason of the declination of the Union Trust Company of New York to deliver to said Butterfield the bonds of the May Lundy Mining Company of London, as provided in said contract, and by reason of said Butterfield's notifying said Frederic A. of such declination by said Trust Company within thirty days from the date of said contract, to wit, on or before Aug. 30, 1883. Said Butterfield never did so notify said Frederic A. Said contract was never abandoned by said Frederic A. and said Butterfield, or by either of them, but was performed and carried into execution by said Frederic A., according to its terms, at an expense to said Frederic A. of two hundred and eighty-two dollars and fifty cents, which he was obliged to pay to the Union Trust Company of New York, aforesaid, in order to obtain their consent to hold the deeds as provided in said contract. And said Frederic A. never ceased to have a right to retain the said Swift note as against said Butterfield or the complainant, Gregory. On the other hand, the right of said Frederic A. to retain said note became confirmed on Jan. 1, 1884, as hereinafter stated; that is to say: —

Said Butterfield failing to pay the purchase money, as the complainants set forth in their bill, lost, at the close of Jan. 1, 1884, under the terms of said contract, all right they might before have had to redeem said note for $20,334.60; and said Frederic A. became entitled to retain the same as he has done and as this defendant is now doing. Upon said failure of Butterfield to make said payment, said Frederic also became, in accordance with the terms of said contract, entitled to take back from said Union Trust Company, where they were deposited, his deeds of conveyance of said mining

4. Upon information and belief, this defendant denies that said Talbot represented her before said E. R. Hoar under said pretended submission, or claimed so to do; and she says that the hearings were had before said Hoar on the second, third and fourth days of December, 1886, and in said hearings no notice was taken of the fact of the death of said Frederic A. Pike, and said Talbot did not have or claim to have any authority to act for this defendant in the premises. And upon her own personal knowledge, she says that said Talbot did not notify this defendant of the fact of said pretended submission, until the last of said hearings before said Hoar, and not earlier than the 7th of said December.

5. This executrix, although named in the will, was never duly appointed and qualified to act as such until March 1, 1887.

IX.

6. And this defendant further says that said submission was never a valid submission. It was an attempted submission of a cause then pending in this Honorable Court; and there was no rule of Court or other judicial order directing, sanctioning or allowing said submission.

7. Also, said cause involved the rights of other parties thereto, and could not properly be concluded and determined without a determination of those rights of said other parties. One, W. C. N. Swift, as maker and promisor of said notes, was and is a party defendant therein, having been complained against by said Gregory in his original bill. And one John C. Kemp, or Kemp Van Eé, had also, by order of Court, been made a party defendant in said cause, and had, with leave of Court, filed a cross bill, in which he claimed to own one half of one of said notes jointly with said Gregory, to wit, the note for $15,000. Also one George W. Butterfield had been made a defendant in said cause, and claims to our said notes. And the alleged submission, while purporting to be a submission of said cause, was made only between said Gregory and said Pike, and did not submit the rights of any other party in said cause, and was never assented to by them or either of them.

8. Said submission purported to authorize said Hoar to pass over to whichever of said two parties, Gregory or Pike, should in his

judgment be entitled thereto, the notes in controversy, disregarding the claims of said other parties, and would have been a fraud upon said parties, except for the action of said Talbot in notifying said Hoar of said claims, as next hereinafter recited.

9. Said Talbot had possession of said notes at the time of the said pretended submission, and before handing them to said Hoar, notified him that other parties, and especially said Kemp, made claim to the same or some part thereof, and had joined in said cause to assert such claims, and that said notes would be put into the hands of said Hoar, only on condition that said Hoar would make no delivery of said notes under any award which he might make, in a way to involve said Talbot in a violation of his duty to this Honorable Court, to hold said notes within its control for the purpose of making effectual any decree this Court might ultimately make in favor of said other parties, or until some decision or compromise of such claims should have been accomplished. And said Hoar thereupon assented to such condition, and consented to receive said notes under the same, and agreed that he would not deliver the notes, under any award which he might make, until the right of said other parties claiming the same in this Court, and especially the rights of said Kemp, should be determined judicially or otherwise.

10. And this defendant further says, upon information and belief, that on the sixteenth day of December, 1886, said Gregory and Talbot, in writing, requested the said Hoar not to draw out or publish his award in final form until both parties should make known to him their wishes as to such final form thereof.

X.

11. And this defendant further says that no award was ever delivered or published, or could be lawfully delivered or published, because, as she avers, on her information and belief: —

(*a*) The parties never communicated to said Hoar their wishes as to the final form thereof.

(*b*) No judicial or other determination of the claims of said Kemp, and the other persons having claims upon said notes, had or has ever been made; and said Hoar knew this to be so during all the time in which he had the said notes in his custody.

12. Furthermore, this defendant, acting by E. B. Harvey, Esq., on the morning of Dec. 24, 1886, not admitting that a valid submission had ever been made, did revoke the pretended submission aforesaid, by a notice in writing to said Hoar, of which a copy is hereto annexed and marked "A," and at once notified said Gregory of such revocation. And said Harvey had full power and authority in the premises.

13. The so-called award is not a final and complete award, because said Hoar did not pass over the said notes to said Gregory; but, on the contrary, by the consent of both parties, the said notes were taken from the custody of said Hoar and placed in the hands of one John G. Stetson, mentioned in the complainants' bill in this cause as bailee, as set forth in a certain paper or receipt signed by said Stetson, a copy of which is hereto annexed and marked "B." Said taking of said notes revoked said submission, and deprived said Hoar of the power of making an award under the same.

14. The so-called award was made in this way, and in no other: On Dec. 20, 1886, F. A. Brooks, Esq., the plaintiffs' solicitor in said cause, called on said Hoar alone, and unaccompanied by said Talbot, or by any one else acting for the interest which had been of the defendant, Pike, and stated to said Hoar that for certain reasons it was desirable to have the award prepared and ready to be published. And, thereupon, with the consent of said Hoar, said Brooks, in his own office, caused the so-called award to be written out, and carried the same to the said Hoar, who then signed the same and placed it among his papers in his safe. The parties, Gregory and Pike, or any one for Pike, were never called before said Hoar to express their wishes as to the final form which the award should take; nor was any award ever delivered or published to them or either of them. Furthermore, no award of any nature has been duly accepted in said cause, No. 2,170, by this Court; and no such award has, by the plaintiff, Gregory, or any one else, been filed in said cause, No. 2,170, for such acceptance.

15. The said so-called award came into the possession of the complainants' solicitor in this way: At or about noon of Dec. 24, 1886, after the revocation of the submission had been made and notified to said Brooks as well as to said Hoar, it was agreed be-

tween said Brooks and said Talbot that they should go together to the said Hoar and receive from him said notes, and should then jointly place them in the custody of said Stetson, as bailee, subject to their joint order; and said notes were handed by said Hoar to said Brooks for this purpose, and by said Brooks for the same purpose handed to the said Talbot before the paper called an award was passed out of his hands by said Hoar, and then said paper was by him given to said Talbot, who declined to receive it; and thus it went into the hands of said Brooks, having passed from said Hoar, not in publication of a completed award, but as a paper for which said Hoar had no further use. And immediately thereafter said notes were deposited with said Stetson as aforesaid.

16. This defendant, on information and belief, admits that said Harvey and Talbot saw the paper called an award in the office of said Hoar, on or about the twenty-third day of December, 1886, but not in the presence of said Hoar, as she is informed and believes; and she says that said paper was not then and there, or even elsewhere, delivered or published as an award, nor was its final form then and there, or even elsewhere, assented to by said Harvey or Talbot, nor was their opinion or criticism thereon then or ever asked or given.

17. This defendant, upon information and belief, admits that the amount of the Eaton note so-called was paid by said Gregory to said Talbot for said Eaton; but on her own knowledge she says that said note did not go from her to said Talbot, and that said Talbot had no authority to act for her in relation to said note; and on information and belief, she says that Eaton himself sent the note to Boston, and that said Talbot received payment thereof as attorney of Eaton, and not otherwise.

XI.

This defendant further says that the ownership of her testator, during his lifetime in the mining property, in relation to which he entered into the contract of July 31, 1883, upon the consideration of receiving the Swift notes heretofore mentioned, and also, by consequence, his ownership in said notes, was in part merely nominal, and not, to all proportions, actual and personal. He did hold a substantial interest to a certain proportion therein, but beyond that

(3) (4) The release and disclaimer and the motion to dismiss, filed respectively Jan. 2 and Jan. 9, 1886, by plaintiff, Gregory, in equity suit No. 2,170 on the docket of this Court, copies of which are annexed hereto marked "Exhibit 3" and "Exhibit 4."

(5) The stipulation signed by F. A. Pike, and filed in said equity suit No. 2,170, Sept. 25, 1886, a copy of which is annexed marked "Exhibit 5."

(6) Also a copy of the record of action at law in the case of Charles A. Gregory *v.* Charles F. Jones, being cause No. 2,486 on the law docket of this Court, brought by said Gregory, to recover damages for the alleged conversion by Jones of the two original Swift notes, of $20,334.60 each, and the same notes, one of which is described and referred to in the bill of complaint in this case as delivered by said Jones to said Swift in exchange for said Swift's new note for the same sum, dated April 20, 1883. A copy of this record is hereto annexed marked "Exhibit 6."

And the defendant, Mary H. Pike, may file as evidence in this suit, and use the same at the hearing as if taken originally in this cause, so far as the same would be material and competent after objection thereto duly taken by the plaintiffs, the matter following, to wit: —

(7) The testimony given by the plaintiff, Gregory, on cross examination as a witness in equity suit 2,170 on the docket of this Court, and found on pages 31, 32, 33, 34, 35, 36 and 37 of the printed record of said equity suit, a copy of which is annexed hereto and marked "Exhibit 7."

(8) The testimony of Frederic A. Pike as given in said equity suit No. 2,170, and of Frank H. Williams and of Charles F. Jones as set forth on pages 39 to 82 of the record of said equity cause, a copy of which is hereto annexed marked "Exhibit 8."

(9) (10) The stipulations filed respectively Oct. 19, 1885, and Sept. 25, 1886, in said equity cause, copies of which are annexed marked respectively "Exhibit 9" and "Exhibit 10."

(11) (12) (13) The testimony of J. C. Kemp Van Eé, of W. C. N. Swift, and of F. W. Gregory as found in the record of said equity suit 2,170, and annexed hereto, marked respectively "Exhibit 11," "Exhibit 12" and "Exhibit 13."

(14) The testimony of Charles A. Gregory on cross examination in said equity suit 2,170, as found on pages 147 to 160, inclusive, of said record 2,170, a copy of which is annexed marked "Exhibit 14."

(15) The papers filed Jan. 10, 1887, in equity suit No. 2,170, by the plaintiff, for the purpose of withdrawing the order on motion entered by him in said suit Dec. 6, 1886, a copy of which is annexed marked "Exhibit 15."

(16) Also, if the same are competent after objection thereto duly taken by the plaintiffs, the amended answer of F. A. Pike as made and filed in equity suit No. 2,170, and found at pages 17 to 23, inclusive, of the printed record of said equity suit, the said Gregory being the plaintiff in said equity suit, and the said F. A. Pike one of the defendants.

(17) Also, the original answer of said Pike as defendant in said equity suit 2,170, as set forth in pages 10 to 13 of said record, inclusive.

F. A. BROOKS,
Solicitor for GREGORY *et al.*
T. H. TALBOT,
Solicitor for MARY H. PIKE.

EVIDENCE FOR COMPLAINANTS UNDER STIPULATION.

EXHIBIT 1.

RECORD, ETC., NO. 2,632 LAW. JONES *v.* SWIFT.

WRIT.

MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Marshal of our District of Massachusetts or his Deputy, GREETING.

(L. S.)

WE COMMAND you to attach the goods or estate of William C. N. Swift of Dartmouth in the County of Bristol and Commonwealth of Massachusetts, and a citizen of said State in our District of Massachusetts, to the value of fifty thousand dollars, and to summon said Swift (if he may be found in your District) to appear before our Judges of our Circuit Court of said United States, for the first Circuit, next to be holden at Boston, within and for our said District of Massachusetts, on the fifteenth day of May next: Then and there in our said Court to answer unto Charles F. Jones, of the City of San Francisco, in the State of California, and a citizen of said last-named State. In an action of contract; and the plaintiff says the defendant made a promissory note payable to the plaintiff, a copy whereof is hereto annexed. And the defendant owes the plaintiff the amount of said note and interest thereon.

The copy of said note is as follows:

NEW BEDFORD, 4 mo. 20th, 1883.

$20,334.60.

Three years after date, for value received, I promise to pay Charles F. Jones twenty thousand three hundred thirty-four dollars $\frac{60}{100}$ with interest at six per cent. per annum.

(Signed)

W. C. N. SWIFT.

To the damage of the said plaintiff as he says, the sum of forty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, The Honorable Morrison R. Waite, at Boston, the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and eighty-six.

ALEX. H. TROWBRIDGE,
Deputy Clerk.

[MEMORANDUM. Marshal's return on writ omitted in printing by direction of counsel for both parties. JOHN G. STETSON, *Clerk.*]

ANSWER.

[FILED JUNE 14, 1886.]

And now comes the defendant in the above-entitled action, and, answering, says that the instrument in the plaintiff's declaration set forth and described as signed by the defendant is payable only to Charles F. Jones, and is not negotiable; that the said action is brought by Thomas H. Talbot, Esq., as attorney, without authority in law or in fact from the said Jones; that the said Jones has no interest or title in the said note or instrument, and claims to have none, and that he has released the said note or instrument, and whatever right of action he might have thereon, to the defendant; that the said instrument was not assignable, the plaintiff having agreed in writing with the defendant at the time said instrument was given to hold it in his possession until it matured, of which all the various persons now claiming the right to possession of the said instrument, and to receive the proceeds thereof, had notice before the times when they severally claim to have acquired rights therein; that one Charles A. Gregory, and one Frederic A. Pike, and one George W. Butterfield, and one C. H. Eaton claim to be severally the assignees of the said instrument, or of a part thereof, and that a suit in equity is now pending in this Court between said Gregory and said Pike, and other persons, and to which said Butterfield has been ordered to be made a party, in which suit each of the said persons claims that he and not the others is entitled to the sole possession of the said note, and to receive its proceeds, in which suit also the defendant in this action is a defendant; that the defendant not only is unable to decide between the claims of the said Gregory, Pike and Butterfield, but is advised that no one of them has the right to sue upon the said

instrument, or to receive the proceeds thereof, and, therefore, denies the right of the said Gregory, or of the said Pike, or of the said Butterfield, to bring this action in the name of said Jones, and says that this action was instituted and is maintained without authority of said Charles F. Jones, and that no person other than the said Jones has ever acquired a right to sue upon said instrument.

And the defendant, further answering, says that the said instrument in the plaintiff's declaration described was obtained by fraud, and given without any consideration, so that he is not liable thereon.

By his Attorney,

HENRY W. SWIFT.

AFFIDAVIT OF HENRY W. SWIFT.

[Filed Dec. 16, 1886.]

I, Henry W. Swift, counsel for the defendant in the above-entitled action, on oath declare that I verily believe that there is a good defence to the same, in that the action is brought upon a non-negotiable promise to pay the plaintiff, Jones, $20,334.60, and is brought without the authority of the said Jones, or of any person having a right to sue thereon, and that no person other than the said Jones has ever acquired a right to sue in the name of said Jones on the said instrument, and that the said Jones himself claims no interest in the said instrument or any right to recover upon the same.

HENRY W. SWIFT.

Subscribed and sworn to, Dec. 16, 1886, before me,

John G. Stetson,

U. S. Com'r.

PLAINTIFF MOVES FOR JUDGMENT.

[Filed Dec. 16, 1886.]

Now comes the plaintiff in the above-entitled cause, wherein the defendant was, on the ninth day of the present month, defaulted, and moves for judgment.

By his Attorney,

THOMAS H. TALBOT.

STIPULATION.

[FILED DEC. 17, 1886.]

It is hereby agreed that the defendant, Swift, will make an application to Judge Colt to stay execution in the case of Jones *v.* Swift, No. 2,632, in the Circuit Court of the United States, District of Massachusetts, on Monday next, Dec. 20, or as soon thereafter as Judge Colt will hear the same in Boston, and that until such application is made and heard no execution shall issue in the above-entitled case. With liberty to the plaintiff to vacate the judgment, and enter it on a later day.

THOMAS H. TALBOT,
For Plaintiff.
GRAY & SWIFT,
For Defendant.

BOSTON, Dec. 17, 1886.

AGREEMENT.

[FILED JAN. 6, 1887.]

It is hereby agreed that in the above-entitled action the defendant having paid into court the sum $24,926.90, that being the amount of the judgment in the said action, with interest thereon to date, the same is acknowledged to be in full satisfaction of said judgment, and there shall be entered on the docket, judgment satisfied.

THOMAS H. TALBOT,
Attorney for Plaintiff.
HENRY W. SWIFT,
Attorney for Defendant.

BOSTON, Jan. 6, 1887.

MOTION OF DEFENDANT AFTER PAYMENT OF AMOUNT OF JUDGMENT INTO COURT TO HAVE INSTRUMENT SUED ON DELIVERED UP TO HIM OR CANCELLED AND ON FILES OF COURT.

[Filed Jan. 7, 1887.]

And now comes William C. N. Swift, defendant in the above-entiled action, having paid into Court, on the sixth day of January, 1887, the amount of twenty-four thousand nine hundred and twenty-six 90-100 dollars, in conformity with the order of this Court of Dec. 28, 1886, the said sum being the full amount of judgment in said action, with interest thereon, to the said day of payment into Court, and prays the Honorable Court to order the note or instrument on which said judgment was recovered to be delivered up to him, the said defendant, or his attorneys, or that the said note or instrument shall be cancelled, and marked "paid" across the face thereof, and filed in Court, or otherwise disposed of, so that the said defendant may be fully protected, and the said note or instrument be no longer outstanding against him, and that the clerk of this Honorable Court be ordered to enter on the docket of said Court satisfaction of the said judgment.

WILLIAM C. N. SWIFT,
By his Attorneys,
Gray & Swift.

SUGGESTIONS TO COURT BY CHARLES A. GREGORY IN BEHALF OF HIMSELF AS BENEFICIAL PLAINTIFF IN SAID SUIT.

[Filed Jan. 10, 1887.]

And now comes Francis A. Brooks, one of the attorneys of record for the plaintiff in the above-entitled suit, employed as such by Charles A. Gregory, hereinafter named, and acting in his behalf, and suggests to the Court that Charles F. Jones, the nominal plaintiff in said suit, and payee of the note declared on, did not, at or before the date of the writ, or at any other time, own said note, or have any beneficial interest therein, but had previously to the date of said writ negotiated the same to Frederic A. Pike, then of Calais, Maine, but now deceased, and had also transferred and assigned the said note of all his, the said Jones's, interest therein, to Charles A.

Gregory of Chicago, Illinois, by whom said note was claimed as against the said Pike; that by reason of these two conflicting claims of title to said note it was, on the eighth day of January, 1886, arranged and agreed between said Pike and Gregory that this (the above-entitled suit) should be brought on said note at the maturity thereof, and prosecuted by two counsellors or attorneys of this Court, to wit, Thomas H. Talbot and Francis A. Brooks; and that such suit should proceed under the joint control and direction of the said Talbot and Brooks; that this suit was so brought and prosecuted by them jointly as attorneys for the claimants respectively, that is to say, by said Talbot as attorney for said Pike, and by said Brooks as attorney for said Gregory, until the decease of said Pike, in the month of December last; that said Pike left a will, but his will has not yet been probated, and no letters testamentary, or of administration, have been taken out on his estate.

And said Gregory gives the Court to be informed that under and by virtue of a certain agreement of submission to arbitration for the purpose of determining the question of the true ownership of the note declared on in this suit, entered into between himself and said Pike before the death of the latter, and of the award of the arbitrator duly made thereunder in favor of said Gregory's title, he, Gregory, has become lawfully entitled to the possession of said note, as the owner thereof, and likewise entitled to receive the benefits of the above-entitled suit, and to represent solely and exclusively the nominal plaintiff therein, Charles F. Jones; and that said Talbot is no longer entitled to represent the said Jones, nor the said Pike, deceased as aforesaid, as an attorney in said suit.

And said Gregory further represents and suggests to the Court that he has or will this day file his bill of complaint against the said Talbot and others as a supplemental bill in the suit in equity entitled Gregory *v.* Pike *et al.*, now pending in this Court, and numbered 2,170 on the equity docket thereof.

And said Gregory respectfully prays that these suggestions and representations by him made to the Court may be filed in the above-entitled suit and made a matter of record therein.

F. A. BROOKS,
Att'y for CHAS. A. GREGORY

ORDER OF COURT.

[JAN. 10, 1887.]

COLT, J.

Ordered, That the sum of $24,926.90 in the registry of the court in this cause, subject to the order of Court, be transferred to the cause in equity No. 2,170, Charles A. Gregory *v.* Frederic A. Pike *et al.*, to remain subject to the order of Court in that cause. This order is made after deposit with the clerk of the note upon which this action is based, and after satisfaction of judgment is entered in said cause No. 2,632.

By the Court,

JOHN G. STETSON, *Clerk.*

BOSTON, MASS., CLERK'S OFFICE,
UNITED STATES CIRCUIT COURT,
Jan. 6, 1887.

$24,926.90.

Received of William C. N. Swift, by his attorney, Henry W. Swift, twenty-four thousand nine hundred and twenty-six and 90-100 dollars, to remain in Court subject to the order of Court of Dec. 28, 1886, in No. 2,632 Law Docket, Charles F. Jones *v.* William C. N. Swift, said $24,926.90 being the amount of the judgment and interest in said cause to date.

(Signed) JOHN G. STETSON, *Clerk.*

DOCKET RNTRIES.

T. H. TALBOT, *for Complainant.*
F. A. BROOKS (Dec. 27, 1886), *for Complainant.*
HENRY W. SWIFT, *for Defendant.*

May T. 1886.	May 15.	Entered.
	June 14.	Answer filed.
Oct. T. 1886.	Dec. 9.	Carpenter, J. Def't defaulted.
	" 16.	Affidavit of H. W. Swift filed.
	" 16.	Motion for judgment filed.
	" 16.	Carpenter. J. Judgment D. 24,794.64 C. 45.31 $24,839.95
		" " Ex'on not to issue till Dec. 20, 1886.
	" 17.	Stipulation as to ex'on &c., filed.
	" 28.	Colt, J. Execution to be stayed ten days to give opportunity to defendant to pay amount of judgment into Court. If paid in, money to remain in Court subject to Order of Court.
	Jan. 6.	Defendant, by his attorney Henry W. Swift, pays into Court $24,926.90 pursuant to Order of Court of December 28, 1886.
	" 6.	Agreement filed.
	" 7.	Motion of defendant to have note sued on delivered up or cancelled and placed on file, filed.
	" 10.	Suggestions to Court by Charles A. Gregory in behalf of himself as beneficial plaintiff in this suit filed by leave of Court. Colt, J.
	" 10.	Note deposited and judgment satisfied.
	" 10.	Colt, J. Order of Court transferring $24,926.90 in Registry to Equity cause, No. 2170, Gregory *v.* Pike *et al.*
	Feb'y 21.	T. H. Talbot, plaintiffs' att'y, claims a lien on amount collected for counsel fees.
	Apr. 20.	Deposition of George W. Butterfield received from C. H. Fiske, N. P.
May T. 1887.	June 28.	Deposition opened and filed at request of G. D. Noyes, counsel for Butterfield.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

No. 2,632.

CHARLES F. JONES *v.* WILLIAM C. N. SWIFT.

DEPOSITION OF GEORGE W. BUTTERFIELD.

Int. 1. What is your name, age, residence, and occupation?

Ans. George W. Butterfield; forty-four years; San Francisco, California; miner.

[*Thomas H. Talbot, who was and is the sole attorney of the plaintiff, Jones, in this action, and on whom notice has been served of the taking of this deposition, appears, and objects to the taking of the same, because there is now no such action pending, judgment having been recovered therein, and satisfied in full, and because there is no party in said suit requesting the taking of this deposition, Charles A. Gregory never having been a party to said suit.*]

Int. 2. Whether or not in the spring of 1883 you negotiated the sale to W. C. N. Swift, of New Bedford, Mass., of certain shares of mining stock belonging to Charles A. Gregory, of Chicago, placed by him in your hands for that purpose, and received payment partly in cash, and partly in the notes of said Swift, if not, how otherwise?

[*Mr. Talbot objects to this interrogatory if it be intended thereby to educe testimony as to the equitable ownership of the note which was sued in this case, as that question of the equitable ownership of that note was not in issue in this suit.*]

Ans. I did.

Int. 3. Whether or not these notes of Swift, first given to you, were afterwards surrendered to Swift in exchange for other like notes of his drawn payable to Charles F. Jones; if so, whether or not two of these new Swift notes afterwards came into your hand through said Jones, one for $15,000, and one for $20,334.60, if not, how otherwise?

Ans. They were surrendered by Charles F. Jones to Swift. Jones

held the new notes until July 31, I think, and we made an agreement with F. A Pike, and all bonds and deeds and documents were standing in my name, and we had arranged with Pike to hold two of these notes for collateral security. He requested me to take the notes, mentioned in the question, from Jones and pass them over to him. I did so on said July 31.

Int. 4. Whether or not, on or before the thirty-first day of July, 1883, you entered into a contract in writing with Frederic A. Pike, of Calais, Me., for the purchase from him of certain California mines known as the May Lundy, the Lake View and the Lucky Morton mines, if not, how otherwise?

Ans. I did.

Int. 5. Have you now in your possession one of the parts of that contract as executed by you and Pike; if so, will you produce it; if not, then will you state where it is and why you cannot produce it at this time?

Ans. I have a certified copy of it. I have not the original here. The original is with my attorneys, in San Francisco.

Int. 6. Please produce and hand to the magistrate a copy of that contract the original of which you say is in San Francisco, to be made an exhibit in this case.

Ans. I now produce it and hand it to the magistrate. It is marked "Exhibit A, C. H. F."

Int. 7. It appears from the sentence found at the foot or end of the contract, as shown by the copy, that, in lieu of making a cash payment to Pike of $25,000, you lodged with him two certain notes, one of $15,000 and one of $20,334.60, made by W. C. N. Swift, with authority to Pike to raise $25,000 by pledge of said notes: whether or not these two notes were then the property of Charles A. Gregory; if not, how otherwise?

[*Counsel for Jones objects to the form of the question.*]

Ans. They were substantially the property of Charles A Gregory, but I had permission from Charles A. Gregory to use the notes at the time I pledged them to Pike.

[*The counsel for Gregory objects to so much of this last answer as relates to the alleged permission of Gregory to use the notes, because the same is not responsive to the question.*

Counsel for Jones objects to all preceding questions, and all hereafter to be put, relating to the ownership of the notes, because the ownership of the notes is not in issue in this suit.

The witness having said of his own motion that he wished to make a further statement in confirmation of the facts stated in his last answer, and an objection having been raised by the counsel for Gregory to his making such further statements, unless such statements were in direct response to the question last put, the magistrate now states to the witness that he shall take down as a part of the deposition anything further the witness may say, subject to the noted objections of the several counsel in the case, as the magistrate considers that his duties are ministerial and not judicial.

Thereupon the witness adds the following words to his last answer: "And have that permission in writing, and wish to leave it in the hands of the justice."

The witness hereupon produces and hands to the magistrate three papers, which are respectively marked by him "Exhibit B, C. H. F.," "Exhibit C, C. H. F." and "Exhibit D, C. H. F."]

Int. 8. This contract marked "Exhibit A" appears to contain a provision to the effect that if the Union Trust Company should decline to deliver to you certain bonds of the May Lundy Mining Company, then the contract should be void; whether or not did the Trust Company decline to deliver the bonds to you?

Ans. They did decline.

Int. 9. Whether or not the Trust Company ever was requested to deliver the bonds of the May Lundy Mining Company to you, or to any one for you? If so, state when and where it declined so to do, and what notice of this, if any, you ever gave to Mr. Pike.

Ans. They declined to give them to me, and Mr. Jones and Mr. Kemp, that were associated with me. It was at their office, in New York City. It must have been somewhere from the 3d to the 15th of July that I called myself Mr. Kemp and Mr. Jones called later, and notified me in San Francisco that they would not give them up.

Int. 10. It appears from the date of contract Exhibit A, made between you and Pike, that that contract was made on the thirty-first day of July, A. D. 1883; if that is the true date of the contract, are you not mistaken in fixing July 3 to 15 as the time when you called

upon the Union Trust Company for the delivery to you of the May Lundy bonds?

Ans. I was mistaken in stating the date as July; it must have been in August, 1883.

Int. 11. What notice, if any, did you give to Pike of the fact of the refusal of the Union Trust Company to deliver to you these May Lundy bonds, and how was this notice first communicated to him?

Ans. I first got Hall McAllister, of San Francisco, my attorney, to notify Pike by telegram; then I wrote a letter myself to Mr. Pike, telling him they would not give the bonds up under the contract he gave me, and that he must go to New York, as he agreed at the time of making the contract, and arrange with the company so I could get the stock and bonds.

[*Counsel of Mr. Jones objects to parol testimony as to contents of the letter.*]

Int. 12. Whether or not, so far as you know, the said Pike ever received this notice, and what reason, if any, you have, for stating that he did receive such notice in any way?

Ans. I got an answer to my letter that I wrote him, Pike, notifying him that they would not give me up the bonds.

Int. 13. Whether or not you ever had any conversation with Pike in which he showed he had received that notice, or knew that the bonds were not delivered to you by the Trust Company?

Ans. Yes, I had various conversations relative to giving up the notes, as he promised in the contract.

Int. 14. Whether or not you ever made any claim or demand on said Pike for these notes, and, if so, how did he meet such claims or demands?

Ans. I afterwards made another contract with him, and he made conditions in it that he would give them up, and he did not carry out that contract, and I afterwards sued him for the performance of this contract, and for the recovery of the notes.

Int. 15. Whether or not the title to said mining property so bargained to you by Pike, in contract marked "Exhibit A," was ever conveyed by him to you, or a deed of conveyance thereof ever offered to you, on or after Jan. 1, 1884, when the purchase money became payable, according to the terms of the contract?

Ans. No.

Int. 16. Whether contract A was pursued and followed up by yourself or Pike after Jan. 1, 1884, or was it abandoned, and treated as no longer in force on either side?

I mean did Pike at any time after Jan. 1, 1884, offer to carry out said contract A, or call upon you to do so?

Ans. No.

Int. 17. Whether or not the same mining property was afterward bargained by Pike, or contracted by him to be sold to other parties, and, if yea, then when, and to what other parties?

Ans. It was; I think that Gregory had a bond of it; afterwards I had a bond, and arranged with another company I organized in London, called the West May Lundy Company.

Int. 18. Whether or not Pike entered into an agreement for a conveyance of the said mining property to the West May Lundy Company, which agreement was signed by him in writing, or whether Pike entered into any agreement in writing by which he contracted to convey said property to either West May Lundy Company, or to some one in trust for said company?

Ans. He entered into an agreement to convey the property to the West May Lundy Company, or to H. Lee Borden, who was made a trustee of the company to take the title, and the property was conveyed by F. A. Pike for the benefit of the West May Lundy Company, Limited, to H. Lee Borden.

Int. 19. Did you ever see that contract, or know the contents of the same?

Ans. Yes, I saw it, and knew the contents of it.

Int. 20. Whether or not you now have in your possession a copy of said contract?

Ans. I have a copy certified by the Court.

Int. 21. Will you please produce a copy of this contract, and hand it to the magistrate, to be annexed to your deposition, and marked "Exhibit E, C. H. F."?

Ans. I do so produce it, and it is so annexed and marked (by the magistrate).

Int. 22. This copy of contract, Exhibit E, refers to the $15,000 Swift note and the $20,000 Swift note, as to be given up by said

Pike; whether or not these are the same notes referred to in contract, Exhibit A?

Ans. They are.

Int. 23. To whom were these notes to be given up by Pike, and whether or not he did give them up, or how otherwise?

Ans. They were to be given up to me; he never gave them up to me.

Int. 24. Whether or not this second contract of Pike, Exhibit E, for the sale and conveyance of this mining property, was ever carried out during the lifetime of said Pike?

Ans. It never was carried out as far as Pike was concerned.

Int. 25. Whether or not at the date of contract A you owned any interest in the property held by Pike and bargained by him in his name, and was to receive any part of the proceeds of said mining property, had these contracts, or any of them, been carried into complete execution, and, if so, how much were you to receive, either directly or through some third person acting as trustee or agent for you?

Ans. I was an owner in the property, and, provided all existing contracts had been carried out, I should have received a large remuneration in consideration of the existing contracts.

Int. 26. Whether this remuneration so coming to you under contract A, in case that contract had been carried out by payment of the purchase money in full, was more or less than $25,000, for security of which these Swift notes were pledged by you to Pike?

Ans. Certainly I would. It was more than $25,000 that I would have received in such case.

Cross-Interrogatories by T. H. TALBOT, Esq., *as Counsel for said C. F. Jones*, de bene, *and saving all objections.*

Cross-Int. 27. Please examine "B" handed by you to the magistrate, and say what it is, and how it came into your hands.

Ans. It is a letter written to me, dated the sixth day of August, 1883, by Charles A Gregory, from London, relative to inquiry that I made of him by telegraph. I cabled him, when I found it became necessary, in effect, asking him if I should use the notes. I had previously asked his consent to use the notes, if it became necessary, to

satisfy the bond we held of F. A. Pike for the mining property that we had sold in London. Gregory being a partner with me at the time. When I left London, on the 9th of July, 1883, I asked Mr. Gregory if I should use the notes. He said that I might, if it became necessary, but I should cable him before doing so. I cabled him that it would be necessary to use the notes. He cabled back, and I have not a copy of the first cablegram, and there were several cables passed between us, and he finally cabled that he should expect one third of the mining property, if his notes were used. I held an agreement at the time with Gregory for a certain interest in the company, and these notes were originally put up for that interest, and to raise money that might be needed for his own use and the use of carrying through our operations. At the time he left New York with me to go to London I held the notes, and delivered them up to him, on account of his declining to sign the contract. He finally signed the contract, and delivered the notes up to me again, and told me to sign them over to C. F. Jones, who was interested with me, and send them to Boston by F. H. Williams, of Boston, and gave his written instructions for Jones to negotiate the notes, pay Mr. F. A. Brooks $1,525, $500 to Walter Greenleaf, of Chicago, $15,000 to be forwarded to G. W. Butterfield, Laugham Hotel, London, to pay $2,025 for Gregory in Boston.

Cross-Int. 28. You speak of Gregory signing the contract: please examine the copy of a contract in the record in suit in equity in the Circuit Court of the United States for this district, No. 2,170, on page 149, and say if that is a copy of the contract to which you refer.

[*Objected to by counsel for Gregory because it has no reference to any matter called out on the examination in chief.*

Adjourned.]

SATURDAY, April 16, 1887.

Present: F. A. BROOKS, *Counsel for Gregory; and*
T. H. TALBOT, *Counsel for Jones.*

[*Counsel for Gregory also objects to the last question, for the further reason that the contract inquired about is not in issue in this case, and, if it were, it would not be competent to prove the same in the manner attempted by this interrogatory.*]

Ans. There was additional matter appended to this contract between Gregory, Butterfield and Jones, that he wished me to sign, which I refused to sign; this matter was added to the contract by Gregory himself. I refused to sign it at the time he annexed it, and I do not remember of ever signing it afterward. I wish to place this matter before the Court, as I do not wish any of the papers in my possession to be left out of this deposition. The copy in the printed book, page 149, inquired of, is the copy of the one I refer to.

Cross-Int. 29. Have you the original contract signed by Gregory, and will you furnish it to the magistrate, that it may be annexed to this deposition by copy?

[*Counsel for Gregory objects to this question, for the reason previously stated.*]

Ans. I have it, and will furnish it to the magistrate, if he will furnish me with a copy.

Cross-Int. 30. What do you know of the handwriting and signature of Charles A. Gregory, Esq.? Please examine the letter which you have put in as Exhibit B, and say whether that is in the handwriting and bears the signature of said Gregory.

Ans. I have several letters in my possession written by him. I have seen him sign his name repeatedly. Exhibit B is in the handwriting of Charles A. Gregory, Esq., and signed by him.

Cross-Int 31. You see the date of this letter is July 6: what have you to say about the date? Is that the correct date?

Ans. It is not the correct date. It should have been Aug. 5, because it is in reply to a cablegram, that I have in my possession, dated Aug. 5, 1883, and refers to the same matter, clearly explaining that the date should have been Aug. 5. I mean to say that the date of the letter should have been August instead of July.

Cross-Int. 32. Please examine Exhibit C, and state what that is and how it came into your hands.

Ans. It is a cablegram from Mr. Gregory in London. He sent it to myself and J. C. Kemp at the Quincy House.

Cross-Int. 33. You were in Calais, Me., on July 31, 1883: when did you leave Calais, and where did you go immediately?

Ans. I came to Boston, leaving Calais in a very few days after

July 31. I stayed two or three days in Boston and then went to New York.

Cross-Int. 34. How long did you stay in New York, and where did you go to from New York?

Ans. I stayed a day or two in New York and then went to San Francisco. I might not have stayed but one day in New York.

Cross-Int. 35. What was your purpose in going to San Francisco?

Ans. To attend to the business that I was engaged in in connection with this mining business in London and America.

Cross-Int. 36. What was this mining business? Please state fully.

Ans. It was mines situated in Mono County, California, the same property that I had contracts with F. A. Pike and others in the United States, and had contracted to sell in London.

Cross-Int. 37. What was the date of the contract that you have just stated with F. A. Pike?

Ans. There were two contracts, one dated Jan. 29, 1883, — and that one was cancelled, — and one substituted July 31, 1883.

Cross-Int. 38. How long did you stay in California on this business?

Ans. I think I stayed in California till October, and left then for England.

Cross-Int. 39. What was your purpose in going to England?

Ans. The company cabled me to come in consequence of the Union Trust Company refusing to give up the bonds.

Cross-Int. 40. When and where did you receive this cablegram?

Ans. San Francisco. I don't remember the date.

Cross-Int. 41. Have you this cablegram with you, and if not, what has become of it?

Ans. I have not. My attorneys in San Francisco probably have that cablegram.

Cross-Int. 42. What communication did you make to Pike on the receipt of this cablegram?

Ans. I don't remember whether it was before I got the cablegram that McAllister had telegraphed him and that I had written him that they would not give up the bonds.

Cross-Int. 43. Did you make any communication to that effect to Pike other than what you stated yesterday, that is, by the telegram of McAllister and your letter to Pike?

Ans. I won't say positively, but I think there were several letters passed between Pike and me.

Cross-Int. 44. Was there any letter passed from you to Pike after the receipt of the cablegram from the company, as just stated by you?

Ans. I won't say positively, but I think there was. I remember distinctly one letter that I had, and hold at present, in answer to the letter that I wrote him that they would not give up the bonds. That letter is in London, and was directed to the American Exchange.

Cross-Int. 45. What did the cablegram from the company call you to London to accomplish?

Ans. As the bonds had not been delivered, I was called there to pay some five thousand dollars or six thousand dollars expenses that I had left the money for paying before I left London with Mr. Gregory, and he went and bought electrolysis.

Cross-Int. 46. State definitely from whom was this cablegram calling you to London.

Ans. It was from the May Lundy Mining Company, or some one connected with the company.

Cross-Int. 47. You stated yesterday that you received an answer from Pike to your letter stating that the Trust Company would not deliver the bonds: have you that answer with you; if not, where is it?

[*Counsel for Gregory objects to this question because already answered in reply to Cross-Int.* 44.]

Ans. It is in London: I have not got it with me.

Cross-Int. 48. Will you procure it and cause it to be annexed to this deposition?

Ans. I will.

Cross-Int. 49. Did you demand the bonds from the Trust Company while you were in New York on your way from Calais to California, as you have stated?

Ans Yes, I went to the Union Trust Company and they said

they had not been sent over from Morton, Bliss & Co., and they could not deliver them till they were delivered to them, and Pike's deeds were sent on. I asked them if it would be all right, and they said it would, as far as they knew. I went back to Morton, Bliss & Co., Mr. Jones went with me, and they said there was eighteen hundred dollars more to be paid on them before they were to be sent to the Union Trust Company. Mr. Jones remained in New York to attend to that and I went to San Francisco.

Cross-Int. 50. Did you make any other demand of the Union Trust Company yourself?

Ans. Not personally, but by others to whom I had given a power of attorney.

Cross-Int. 51. How soon after you reached San Francisco did you employ McAllister to telegraph to Pike that the delivery of the bonds had been refused?

Ans. As soon as it became necessary.

Cross-Int. 52. Did this refusal, which you have stated fully as made to you personally in New York, make it necessary or not?

[*Counsel for Gregory objects to this interrogatory because it assumes that the witness has testified that he was finally refused these bonds by the Union Trust Company, in New York, which is not the case.*]

Ans. No, it did not, that refusal did not.

Cross-Int. 53. Did you or not communicate that refusal to Pike?

[*Objected to by counsel for Gregory, because it assumes that the witness had testified that he was personally refused the delivery of these bonds by the Union Trust Company, of New York.*]

Ans. No, I did not.

Cross-Int. 54. By whom was the $1,800, you mentioned, to be paid?

Ans. It was to be paid by Kemp, Jones, or either of them. I left both of them here for that purpose to attend to that matter. At that time I gave, or rather told Jones to give, Kemp a $20,334.60 note; he passed it over to me, Jones did, and I handed it to Kemp myself, and he promised on my leaving that day to go over to New Bedford to Mr. Swift's and raise money on the note to meet any requirements that were necessary in New York.

Cross-Int 55. Was not this note for $20,334.60 delivered to

Kemp in Boston before you went down to Calais to make the contract of July 31?

[*Counsel for Gregory objects to this question.*]

Ans. I think not, for the reason that it was expressly understood that it was to be delivered over for that purpose, and if it had been before I went to Calais, it could not have been for that purpose.

Cross-Int. 56. What refusal of the Union Trust Company to deliver those bonds did you communicate to Pike?

Ans. There were several communications from Jones, the telegram from McAllister, and the letter from myself. Mr. Pike, on learning this, finally went to New York to the Union Trust Company, so Mr. Jones wrote me, and he could not arrange himself with them to give up the bonds. The only communications I made was the one through McAllister and the letter I wrote myself.

[*Counsel for Jones objects to the last answer as not reponsive to the question, and as stating matters of hearsay.*]

Cross-Int. 57. What refusal in your letter to Pike, of the Union Trust Company, did you communicate?

Ans. I communicated the information necessary according to the contract I had with Mr. Pike.

[*Counsel for Jones objects to the answer as wholly irresponsive to the question, stating matters of law instead of matters of fact.*]

Cross-Int. 58. Yesterday, in your examination, you stated that you made a personal demand for these bonds when you were in New York, and that they were refused to you, and that you communicated that to Pike; today you state that was not the refusal which you communicated to Pike: I now ask you what was the refusal you did communicate to Pike? By whom was the demand made and when?

Ans. Yesterday, I stated that I made the demand and made an explanation when the demand was made. I made the demand when I went through to San Francisco, and then they had not received the bonds. When I returned from San Francisco, on my way to London, I wanted to get a written refusal from them myself; they told me they had already communicated with the company in Eng-

land, and had been notified to not give up the stock and bonds on the conditions that I had arranged with Mr. Pike.

Cross-Int. 59. Is this the demand and the refusal you communicated to Pike?

Ans. No, it is not.

Cross-Int. 60. What demand and refusal did you communicate to Mr. Pike?

Ans. The refusal that was made to Mr. Jones and Mr. Kemp acting under power of attorney for me in this matter and other matters, and all matters pertaining to the mining business.

Cross-Int. 61. Was this demand upon the Union Trust Company made by both Jones and Kemp?

Ans. I instructed them both to make demands, and they both wrote me that they had.

Cross-Int. 62. Did they make a joint demand, or was a demand made separately? Did you receive a letter from both about the same time?

Ans. I received several letters from them about the same time. I think Mr. Jones and Mr. Kemp went there together, and made a demand at the same time. And I telegraphed Mr. Jones to call on Mr. Pike to go with him, as he had agreed with us in Calais, as he was present at the time when Mr. Pike promised us if there was any difficulty in getting the bonds that he would go and get them. I know that Jones wrote me after that, that he had been there again to the Trust Company and that it was impossible, that he could not get the bonds.

Cross-Int. 63. Was this the demand and refusal that you communicated to Mr. Pike?

Ans. It was.

Cross-Int. 64. How soon after receiving this information did you communicate it to Pike?

Ans. I have answered that question once, and I have no further answer to make.

Cross-Int. 65. About when did you receive this information from Jones?

Ans. As soon as I got in San Francisco I received correspondence about it.

Cross-Int. 66. When did you receive the last of this information from Jones?

Ans. I don't remember.

Cross-Int. 67. How soon after you received this information did you communicate it to Pike?

Ans. I have answered that question once before, and I have no further answer to make.

Cross-Int. 68. After July 31, 1883, when you left Calais, when did you first see Mr. Pike again?

Ans. I think it was the summer of 1884.

Cross-Int. 69. Then it was in the summer of 1884 or later that the various conversations with Mr. Pike, relative to giving up the notes which you testified to yesterday, took place, was it not?

Ans. I think it was.

Cross-Int. 70. And these conversations resulted, did they not, in the agreement on the part of Mr. Pike, which I will now read to you: "If the first payment is made next year, I will give my interest in the fifteen-thousand-dollar Swift note, excepting the amount paid Union Trust Company, and, when the other two payments are made, I will give my interest in the twenty-thousand-dollar Swift note"?

Ans. I can't say.

Cross-Int. 71. Did you obtain any other contract from Mr. Pike in regard to these notes other than Exhibit E?

Ans. I cannot answer this question.

Cross-Int. 72. Was it not the agreement in Exhibit E upon which you brought suit against Pike?

Ans. No, sir.

Cross-Int. 73. Did you carry out your part of the contract of July 31, 1883; if so, how?

Ans. I carried it out by putting up the required amount specified in the contract, that is to say, I paid the first amount due on the contract, or rather secured it by putting up the Swift notes, which I had authority to use for that purpose.

Cross-Int. 74. Yesterday you stated that the Swift notes were originally put up to raise money that might be used in part in

carrying through your operations: what operations did you refer to?

Ans. The purchase of the mines in America, and the completion of the organization in London to which these properties had been sold.

Cross-Int. 75. What mines do you refer to?

Ans. I refer to the mines mentioned in the contracts between Gregory, Kemp, Jones and myself.

Cross-Int. 76. Did these include the mines mentioned in contracts between you and Pike?

Ans. Yes.

Direct Examination resumed.

Int. 77. You were asked in Int. 73 whether you carried out the contract of July 31, 1883, with Pike: please state whether Pike carried out that contract on his part with you with regard to the delivery to you by the Union Trust Company of New York of the bonds of the May Lundy Mining Company of London, which bonds, by the terms of that contract, were to be delivered to you; if not, how otherwise?

[*Counsel for Jones objects to this question as leading.*]

Ans. He did not carry out his part of the contract with me, but he never agreed to deliver the bonds to me; it was the Trust Company that were to deliver the bonds to me. This contract with me was, he assured me, that the contract he had made with me would enable me to get the bonds according to the instructions the Trust Company had from the company in London, and they would not deliver the bonds under the contract he gave me, and he stated in his contract with me, if I did not get the bonds, the contract would be null and void and the moneys I had paid would be returned to me.

[*Counsel for Jones objects to the last answer as stating parol conversation to vary the written contract, and as attempting to state the contents of a written contract.*]

Int. 78. Were you able or not able to get the benefit of Mr. Pike's contract with you in this respect? I mean, were you able to get the benefit of the bonds of the May Lundy Mining Company?

Ans. I could not get the bonds.

Cross Examination resumed.

Cross-Int. 79. What moneys did you pay to Mr. Pike under contract of July 31, 1883?

[*Counsel for Gregory objects that this question is not called out or justified by anything in the matter of redirect examination.*]

Ans. I refer you to the contracts. I have no further answer to make. I produce the paper referred to in Cross-Int. 29, it is marked by the magistrate "Exhibit F, C. H. F."

[*At this point the counsel for Mr. Gregory and the counsel for Mr. Jones say that they have no further questions to ask of this witness, whereupon the witness says that he wishes to make a further statement explanatory of his answers as above given, and thereupon the witness says as follows : —*

Here the counsel for Mr. Jones interposed, and stated that yesterday he made a minute with reference to the answer to Int. 24 for cross examination, that on looking at that minute on cross examining he had forgotten its meaning, and omitted to use it; that on hearing the deposition read over to the witness just now the meaning of this minute returned to him, and thereupon asks leave to propound a question relating thereto.

Counsel for Gregory thereupon objects to such further examination of the witness by the counsel for Jones, and assigns for reasons of such objection that the examination of this witness was closed about 1 o'clock today by the mutual consent of both counsel, and an adjournment was had till 3 o'clock, P. M., *to enable the witness to hear his testimony read, and make such corrections therein before signing as he might consider necessary and proper; that on meeting after adjournment at 3* P. M. *the magistrate entered a memorandum at the top of this sheet to the effect that the examination of this witness had been concluded by both counsel in the presence and hearing of counsel, and proceeded to read the deposition to him in full, for the purpose of ascertaining whether the testimony required any corrections or explanations on the part of the witness, and for no other purpose; that Mr. Talbot, the counsel for Jones, also listened to this deposition, and stated to the magistrate that in so listening he was reminded of an inquiry of the witness which he had intended to put while the witness was under crossexamination by him, but which had*

at the time escaped his memory, and he asked leave of the magistrate to put such inquiry at this time, to which the counsel for Gregory objected, and still objects, as an irregular and unjustifiable course of proceeding, and one which is contrary to the uniform practice in such matters; and counsel for Gregory gives notice that if the counsel for Jones is allowed to reopen the examination of the witness under the circumstances he will move to suppress any evidence hereafter taken in answer to such interrogatories.

Counsel for Jones now puts the following additional interrogatory: —]

Cross-Int. 80. In your answer to Int. 24 you stated that the contract E was never carried out as far as Pike was concerned: was it carried out so far as you were concerned? Did you make the payments which that called for in order to entitle you to a conveyance?

[*Counsel for Jones withdraws the above question and substitutes the following: —]*

Cross-Int. 81. In your answer to Int. 24 you state that the contract E was never carried out so far as Pike was concerned: was it ever carried out so far as you were concerned? Did you make the payments which that called for in order to entitle you to a conveyance?

Ans. No, I never did, for the reason, according to that contract, all the property was to be deeded, and was deeded, to H. Lee Borden as trustee for the West May Lundy Company, Limited, of London, and he, Borden, never forwarded any evidence of title to London; and it is contended by the company up to the present day that H. Lee Borden holds all the property that was deeded to him under that deed of trust for the benefit of the company.

The witness now proceeds to make his explanatory statement as follows: —

I desire to correct a statement in my twenty-seventh answer, in which I said that Gregory finally signed the contract in New York before we sailed for England. The contract was not signed by Gregory in New York before we sailed together for England, but was signed by Gregory after we reached England.

I ask permission to forward to the magistrate who is taking this

deposition any documents showing that I have authority to use these notes of Charles A. Gregory's and J. C. Kemp's that were given to me by Swift, and any evidence that goes to show that it was generally understood by both of them that I was to use the notes in connection with the scheme we were engaged in.

In Int. 60 I want to correct my answer so that it will read that my power of attorney was given to Jones, and not to Kemp.

I offer for evidence copy of letter from Mr. Gregory to me, dated July 19, 1883. [*The magistrate marks this paper "Exhibit G, C. H. F."*]

I also offer for evidence copy of memorandum made by Mr. Gregory in New York, and signed by him, dated April 9, 1883. [*The magistrate marks this paper "Exhibit H, C. H. F."*]

I wish to notify the persons here present that I have in my hand, and offer it as evidence, another document, signed by Charles F. Jones and G. W. Butterfield, dated Jan. 4, 1884. [*The magistrate now marks it "Exhibit I, C. H. F."*]

I also offer in evidence another document, made June 19, 1884, between Jones and Buttefield in London. [*The magistrate now marks it "Exhibit J, C. H. F."*]

[*Counsel for Jones now propounds a further question to witness as follows: —*]

Cross-Int. 82. In your supplemental statement you have stated in correction of your answer 60 that your power of attorney to make a demand on the Union Trust Company for the bonds was to Jones alone: what have you to say about the demand made? Was that not made by Jones alone?

Ans. They both made demands.

Cross-Int. 83. Did Kemp have any authority to make a demand?

Ans. Yes; he was a partner with me to the extent of $10,000 at that time.

Cross-Int. 84. Was not Jones a partner with you also?

Ans. Yes.

Cross-Int. 85. Why did you give Jones a power of attorney, if his partnership authorized him to make a demand?

Ans. I gave it to him to transact any business or sign any papers that might be required to be signed by me in my absence.

Cross-Int. 86. Were there any such papers to be signed in connection with the demand and receipt of those bonds?

Ans. I did not know positively that there would be. The power was not given to him for that purpose.

Cross-Int. 87. Was there any demand made by Kemp apart from Jones?

[*Objected to by counsel for Gregory, because the counsel is trespassing upon the rights of Gregory in undertaking to reopen examination of witness as to matters not involved in any corrections made by the witness to his testimony, and to go over again ground already covered by repeated questions in cross examination.*]

Ans. Yes, there was.

[*The witness also says as follows:* —]

In conclusion, I will say that I had authority to use those notes for the purpose they were used, and Mr. Gregory has no right to make any demand until the final settlement of the partnership business.

[*Adjourned to April* 18, 1887, *at* 10 *o'clock A. M.*]

Boston, April 18, 1887.

G. W. BUTTERFIELD.

EXHIBIT A, C. H. F.

Memorandum of agreement made this thirty-first day of July, A. D. 1883, *by and between* G. W. Butterfield *of San Francisco, Cal., on the one part, and* F. A. Pike, *of Calais, Maine, of the other part.* Witnesseth:

That the said Pike agrees to sell and the said Butterfield agrees to buy all of said Pike's interest in the May Lundy Mine, being five hundred and thirty-two nine-hundredths ($\frac{532}{900}$) and of the Lake View and Lucky Morton Mines being the whole of said two mines last mentioned for the sum of two hundred forty-two thousand six hundred and sixty-six dollars ($242,666) payable as hereinafter stated, to wit, twenty-five thousand dollars ($25,000) at the time of this agreement and the remainder of the purchase money to wit, the sum of two hundred and seventeen thousand two hundred and sixty-six dollars ($217,266) on or before the first day of January, A. D. 1884, and said Pike on his part agrees when requested by the said Butterfield to execute Deeds of his interest in the said

mines as above stated running to the May Lundy Mining Company, Limited, of London or to such party in New York as may be mutually agreed upon and to lodge said Deeds in the Union Trust Company of New York in Escrow and to remain in Escrow until the said Pike is fully paid the sums mentioned and is also paid the sum of eight thousand eight hundred and twenty-five dollars ($8,825) being the proportion of the indebtedness on the May Lundy Mine which belongs to the said Butterfield to pay and upon these payments having all been made the deeds of said property so lodged in Escrow in said Trust Company are to be held by said Trust Company free of claim by said Pike thereupon.

And the said Butterfield on his part further agrees that all of the above payments shall be made on or before the first day of January next, and in case the payments are not made as above stated on the first day of January next the sums of money which shall previous to that time have been paid by the said Butterfield to the said Pike under this agreement shall be forfeited; the deeds lodged in Escrow with the said Company, the day after shall be delivered to the said Pike and this agreement to all intents and purposes shall be at an end. It is further agreed that until the said Butterfield shall make all the above payments specified the mining property is to remain as at present in the possession and control of the said Pike who may continue to work the same for the benefit of the present owners thereof and should all the payments before specified be made before the termination of the present contract for hauling ore the said Butterfield agrees to assume and carry out the same contract and should there be any ore left, at the mill at the time of taking possession of the property he should pay the said Pike for the same at the cost thereof. And it is further agreed that Charles N. Fox and W. B. Kellogg of San Francisco who are owners of two hundred and nine nine-hundredths $\frac{209}{900}$ of the May Lundy Mine may become parties to this agreement within thirty days from date by lodging their deed in Escrow with said Trust Company properly executed conveying their interest in the May Lundy Mine to said May Lundy Mining Company and should the deed of said Fox and Kellogg be so lodged in said Trust Company within thirty days from date the said Butterfield agrees to pay them therefor the sum of sixty thousand nine hundred and fifty-eight dollars ($60,958) on or before the first day of January next and should that sum not be paid at said time the said deed is to be returned to said Fox and Kellogg on the second day of January next. And it is further agreed in case the said Fox and Kellogg lodge their deed as aforesaid it shall constitute but one transaction in this that the payment shall not be made to the said Pike unless it is made to Fox and Kellogg nor to the said Fox and Kellogg unless it be made at the same time to the said Pike but the payments are to be made to both

or neither. All the above payments to said Fox and Kellogg and said Pike are to be made to said Union Trust Company or to its correspondents in London. In case the said Fox and Kellogg shall not become parties to this agreement or in case the Union Trust Company declines to deliver the bonds of the May Lundy Mining Company to said Butterfield this agreement shall be void and the money paid shall be returned to said Butterfield.

The action of the Trust Company is to be ascertained and reported to said Pike within thirty days from date.

Signed by the parties thereto on the day above written.

G. W. BUTTERFIELD.
F. A. PIKE.

For the first payment of $25,000 specified in the above agreement, the said Butterfield has lodged in the hands of said Pike the notes of W. C. N. Swift, of New Bedford, dated April 20, 1883, for $15,000 and $20,334.60, payable in two and three years from date, which notes are to be held by said Pike until Jan. 1, 1884, unless sooner redeemed by said Butterfield by the payment of $25,000, and at that time the said Pike is authorized to raise $25,000 out of them by pledging them on the most favorable terms he can obtain.

F. A. P.
G. W. B.

EXHIBIT B, C. H. F.

LONDON, July 6th, 1883.

DEAR KEMP:

Yesterday I received cable from Buterfield Kemp — all plain enough except where it said "if so Buterfield Kemp pump Jones Europe," &c. I cannot understand this. I cabled to you asking in effect if it, the bond, had been satisfied — that I did not understand the part of the message alluded above — that if my notes made by Swift were used, then I wanted one-third interest. Having done this, I awaited your reply. I sent the message to Buterfield Kemp, for I think it not only right that you should see and know all, but I think it very unfair and wrong if all four of us do not equally know everything — you will show this to B. as an expression of my views — any other dealing would to my mind be as evidence of unfairness and deception. *This should have been done from the beginning.* I will never act towards a partner with secrecy. Well, I think you and I ought to help the deal to the utmost, & if we take a large risk we should have an enlarged interest. There is no more to add, except that there is great anxiety here to know how it stands. I ought to have had information on the first of Aug.

Regards to friend B.

Yrs. GREGORY.

EXHIBIT C., C. H. F.

FORM NO. 3.

CABLE MESSAGE.

THE WESTERN UNION TELEGRAPH COMPANY.

All Cable Messages received for transmission must be written on the Message Blanks provided by this Company for that purpose, under and subject to the conditions printed thereon, and on the back hereof, which conditions have been agreed to by the sender of the following message. 2114

THOS. T. ECKERT, *General Manager*,
N. Y.

NORVIN GREEN, *President*.

NUMBER.	SENT BY	REC'D BY	CHECK.
14	G. K.	R. N.	25 London.

Received at 902. AUG. 5, 1883.

To BUTTERFIELD KEMP,
Quincy House, Boston.

Is bond satisfied? Don't understand message after Kemp — my interest to be one third delivered presently, if use notes. — answer.

EXHIBIT D, C. H. F.

COPY OF MEMORANDUM MADE AT NEW YORK.

Forward $15,000 to G. W. B. and pay $2025 for Gregory.
Forward to Langham Hotel, London. Raise $25000.

This is a true copy of a memorandum made by me at New York at the time, and I now hold the original.

FRANK H. WILLIAMS.

EXHIBIT E. C. H. F.

AGREEMENT "E."

Amounts to be paid F. A. Pike.	Deferred Payments 1, 2 and 3 Years.	
Cash on account of end mines	$25,000	$37,500
Cash on account of May Lundy	44,333	66,500
Cash on account of five stamps	3,000	
Debt	9,300	
Cash payment	$81,633	

Pike's deeds of $\frac{732}{900}$ of May Lundy and the whole of the end mines (Lake View and Lucky Morton), to be made out and running to H. Lee Borden. Said deeds are to be lodged with the N. E. Trust Company in Boston. The Trust Company is to receive Borden's draft on London and collect the same. When the amount is collected, the Trust Company is to forward Pike's deeds to Register's Office of Mono County by mail for record. When the deeds are returned to the Trust Company, with the Register's certificate of record, then the Trust Company is to pay the money to Pike. Borden, at the time of forwarding the draft to the Trust Company, is to forward also a mortgage on the property approved by Fox and Kellogg, of San Francisco, securing the payment of the above-mentioned $104,000 in equal payments of one, two, and three years, with six per cent. interest. And this mortgage is to be forwarded by the Trust Company for record at the same time they forward the deed.

Fox and Kellogg are to come in if they choose to do so, and give deed to said Borden of $\frac{202}{900}$ of May Lundy Mine, receiving therefor $43,541, payable in one, two, and three years, equal payments, with annual interest at six per cent., and if they come in, their deed and mortgage to be recorded at the same time as Pike's, but is not to go through the hands of the Trust Company.

This matter to be closed up in thirty days, and possession of the property to be given as soon as the transaction is closed, say on or before Sept. 1, 1884.

Ore contract now outstanding, to be assumed by the purchaser.

If the first payment is made next year, I will give my interest in the fifteen-thousand dollar Swift note, excepting the amount paid Union Trust Company, and when the other two payments are made, I will give my interest in the twenty-thousand dollar Swift note.

F. E. PIKE.

July 25, 1885.

Time is of the essence of this offer. We accept the terms of this

offer on our part, so far as it relates to our $\frac{2}{900}$ interest, and will make deed and accept mortgage accordingly on call, within the time named, time being of the essence of this contract.

CHAS. N. FOX.
M. B. KELLOGG.

EXHIBIT F, C. H. F.

AGREEMENT.

Memorandum of Agreement between GEORGE W. BUTTERFIELD *and* CHARLES F. JONES, *parties of the first part, and* CHARLES A. GREGORY, *party of the second part, and all belonging to the United States of America.*

Whereas, said parties of the first part have purchased the May Lundy, Lake View, and Lucky Morton mines, situate in Homer Mining District, Mono County, State of California, for the sum of two hundred and fifty thousand dollars, lawful money of the United States, upon the following conditions, to wit: Ten thousand dollars cash, and the balance on or before the thirtieth day of July, A. D. 1883:

And whereas said parties of the first part have bonded various other properties in said district from one Howk, one Carpenter, and Gilchrist; and also contemplate bonding other properties to be included:

And whereas it is the purpose, desire, and intention of the said parties of the first part to sell all or a part of said properties, either in the United States or Europe, upon such terms and conditions as they may think advantageous for all parties to this agreement:

Now this agreement witnesseth, that said parties of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, paid by the said party of the second part, and the further consideration hereinafter mentioned, do hereby covenant and agree to and with the party of the second part to give him, the said party of the second part, a one eighth (1-8) part of all the moneys or values realized from the sale of said May Lundy, Lake View and Lucky Morton mines, over and above the price paid for the same, also an eighth (1-8) part of all the moneys or other values realized from the sale of said mines bonded from one Howk, one Carpenter, and one Gilchrist, or others, included in this sale.

It is further agreed that in case said mining properties are not sold or otherwise disposed of, then the said parties of the first part shall assign, transfer and set over the said party of the second part

an undivided one-eighth (1-8) part of all the mines, now bonded from Howk, Carpenter and Gilchrist.

It is further agreed by and between the parties of the first and second parts to this agreement, that said party of second part shall devote his time and energies in assisting said parties of the first part to make a sale of all or any part of said mining properties; under and subject to the direction and approval of said parties of the first part or either of them.

It is further agreed by and between the parties of the first and second parts, that the expenses of said party of the second part, pending said negotiations, shall be defrayed by said parties of the first part.

CHARLES A. GREGORY.

Witness:

J. C. KEMP VAN EE.

JULY 5, 1883.

And whereas said Butterfield now holds two notes made by Wm. C. N. Swift, of New Bedford, Mass., payable to the order of said Butterfield, each bearing date April, 1883, each for twenty thousand dollars and upwards, and one maturing in two (2) years and the other maturing in three (3) years after the date thereof respectively, which said notes are the property of said Charles A. Gregory, of Chicago, Ill., it is hereby agreed that said Butterfield may hold the first maturing note of said two notes as security for the payment of said ten thousand dollars above provided to be made by said Gregory, and shall not be called on to deliver up the same until said Gregory shall have paid such sum of ten thousand dollars as above provided.

CHARLES A. GREGORY.

EXHIBIT G, C. H. F.

JULY 19, 1883.

GEO. W. BUTTERFIELD, Esq.:

Dear Sir, — I send today by mail to Fred W. Gregory, No. 3 Central Wharf, Boston, transfer for shares coming to me, and agreement to transfer shares out of those to come in the future. He will call on you, or my brother Franklin will call on you to sign the same. They will then get order for the 365 Bonds, and then they will deliver the Silver Group Mining Co's. Deed. Please square up matters as soon as possible.

I am doing good work here for the future, but we cannot commit ourselves fully till the property is paid for.

Good success to your efforts.

I send a copy of this to my brother.

Mr. Caldwell gets £25,000 or 500 shares out of the first £50,000

or 10,000 shares. You have given to others 410 shares in all. This leaves you £22,950 to divide. My share is ⅛th or £2,868 3-4 or 573+ shares.

I fill into the transfer only 550 shares, and leave the balance for future settlement. You will transfer to me ctf. No. 64 for 250 shares, & ctf. No. 70 for 200 shares, & ctf. No. 76 for 100 shares.

As to the deferred payments, there is £350,000; out of this £25,000 comes for Caldwell leaving £325,000. My share is one eighth, £40,625, or 8,125 shares of £5 each.

The papers are drawn accordingly.

Yours faithfully,
(Signed) CHARLES A. GREGORY.

P. S. I also send Order on Union Trust Co. for 182 Debentures to come to me.

(Signed) CHAS. A. GREGORY.

[COPY] **EXHIBIT H, C. H. F.**

MR. F. H. WILLIAMS.

Raise some money on the Swift notes. Please go to Frank A. Brooks, lawyer, on Milk Street, and pay him $1,525 in full of a note I made to him lately for $1,500. He will take money and cancel and hand the note to you. Write me care of American Exchange, London. Send also ($500) five hundred dollars to Walter G. Greenleaf, agent, 286 Ohio Street, Chicago, Ill., as from me for necessary uses. He will know how to use it.

(Signed) CHARLES A. GREGORY.

APRIL 9, '83.

This is a true copy of the original held by me.

FRANK H. WILLIAMS.

{Revenue Stamp Royal Courts of Justice Ten Shillings} **EXHIBIT I, C. H. F.**

This Deed, made the fourth day of January, one thousand eight hundred and eighty-four, between Charles F. Jones, of San Francisco, in the county of San Francisco, and State of California, of the one part, and George W. Butterfield, of San Francisco aforesaid, of the other part. Witnesseth, that the said Charles F. Jones, for divers good causes and considerations him thereunto moving, doth hereby surrender and abandon to the said George W. Butterfield, a certain Power of Attorney dated the sixth day of August one thousand eight hundred and eighty-three, made and executed by the said George W. Butterfield to the said Charles F. Jones, touching amongst other things the May Lundy Mining Company, Limited,

of London, and which said Power was therein stated to be coupled with an interest and irrevocable, and was attested by James W. Chapman, of the city of Boston, United States of America, and the said George W. Butterfield doth hereby revoke and cancel such Power of Attorney and the powers and authorities thereby granted and created, and in like manner the said George W. Butterfield surrenders and abandons to the said Chas. F. Jones a similar Power of Attorney made and executed by the said Charles F. Jones to the said George W. Butterfield, dated as aforesaid, and attested as aforesaid, and in like manner the said Charles F. Jones revokes and cancels the same. And the said George W. Butterfield declares that he has in no way acted upon or used the name of the said Charles F. Jones under the said Power of Attorney except by giving a note of hand for one thousand dollars ($1,000) to one I. Vandyck Hubbard, in the joint names of himself and of the said Charles F. Jones. And the said Charles F. Jones declares that he has in no way acted upon or used the name of the said George W. Butterfield under the said Power of Attorney except by giving a note of hand for two thousand five hundred dollars ($2,500) to one Charles A. Dyer in the joint names of himself and of the said George W. Butterfield, and by executing the purchase agreements with the said May Lundy Company in the name of the said George W. Butterfield. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

CHAS. F. JONES. [L. S.]
G. W. BUTTERFIELD. [L. S.]

Signed, sealed and delivered by the above-named Charles F. Jones and George W. Butterfield in the presence of

JAMES CRIOR,
Clerk to Messrs. Poole, Hughes & Coole,
Solicitors, 33 Chancery Lane, London.

EXHIBIT J, C. H. F.

Agreement made this nineteenth day of June, 1884, *between* CHARLES FENNER JONES, *of San Francisco, Cal., United States of America, of the one part, and* GEORGE WASHINGTON BUTTERFIELD, *of San Francisco, aforesaid of the other part.*

Whereas, by an agreement made the 29th of January, 1883, between the said Charles Fenner Jones and the said George Washington Butterfield, it was agreed to engage in the purchase, sale and working of mines in the Homer District, Mono County, California, aforesaid on joint account:

And whereas the said George Washington Butterfield has made arrangements to sell to a company in England, certain of the mines

and mining property referred to in the aforesaid agreement, which said property now stands in the name of the said George Washington Butterfield alone, and it has been agreed by and between the said parties hereto as follows, namely:

The said George Washington Butterfield shall be at liberty to sell to the said company the said mines and mining property in his own name, as the sole owner of such property without any interference or control of the said Charles Fenner Jones or any person on his behalf, and to make and execute all contracts, agreements, conveyances or deeds of any description relating to such property and receive the purchase money for the same either in cash, shares, debentures, or other securities, as he may consider desirable or necessary, and to give valid and effectual receipts for the same as witness the hands of the parties.

(Signed) CHAS. F. JONES.
G. W. BUTTERFIELD.

Witness:
WILLIAM GORDON.

EXHIBIT 2.

SUPREME JUDICIAL COURT.

SUFFOLK, ss.

CHARLES A. GREGORY *v.* JOHN G. STETSON.

DEPOSITION OF CHARLES A. GREGORY.

THOMAS H. TALBOT, Esq., *appears for defendant Stetson, and objects generally to the taking of this deposition.*

Int. 1. State your name, age and residence; and whether you are the plaintiff or claimant in this suit.

Ans. My name is Charles A. Gregory; I am about and upwards of fifty years of age; I reside in Chicago, Ill.; I am the plaintiff or claimant in this cause.

Int. 2. Whether or not you are about to go out of this District of Massachusetts where this cause is pending, and not to return before the trial or hearing of the same?

Ans. I am here temporarily for a few days, and intend to return to my home as soon as possible, and do not expect to be here again before the hearing of this cause.

Int. 3. It appears from the papers on file in this cause, that you claim to be the owner of two certain notes made by W. C. N. Swift of New Bedford, Mass., dated April 20, 1883, one of $15,000 and one of $20,334.60, drawn payable to one Charles F. Jones and not negotiable. State the grounds on which you claim to be such owner, and the facts relating to the origin of these notes.

Ans. In April, 1883, I was the owner of eighty thousand shares of stock of the Great Sierra Consolidated Silver Mining Company of Illinois. I placed these shares with George W. Butterfield, who was then in Boston, to hold in trust for me, and to dispose of the same by sale to W. C. N. Swift of New Bedford, Mass., if he could sell them. They were sold to Swift by Butterfield, and, as part consideration for the same, two notes of $20,334.60 each, dated April 4, 1883, one due at two years and the other due at three years from its date and bearing interest, and payable to the order of George W. Butterfield were made and signed by Swift, and were received by Butterfield, and by Butterfield these notes were indorsed and passed over to me.

On the 9th of April, I placed these two notes in the possession of Butterfield as my property, I taking his receipt therefor, which receipt is as follows, which receipt I now produce. I have the original in my hands. It is the same as is printed on page 3 of the printed record in the case of Gregory *v.* Pike *et al.* in the United States Circuit Court, Cause No. 2,170. Butterfield afterwards placed these two notes in the hands of Charles F. Jones, and he, Jones, afterwards surrendered these two notes to said Swift, and received in exchange therefor one note of $20,334.60, payable at three years from its date, and one note for $15,000, payable at two years from its date, both bearing interest, and dated April 20, 1883, both payable to Charles F. Jones and not to his order, and these are the notes referred to in the bill or pleadings in this suit in which my deposition is taken. In December, 1883, I found that these two notes belonging to me had been pledged by said Jones or by Butterfield, or by both of them, to Frederic A. Pike, of Calais, Me., by a contract dated July 31, 1883. It is the same contract I now have with me, and produce to be annexed to my deposition. This is a copy made by me personally from the original agreement, which was

signed by G. W. Butterfield and F. A. Pike, with the appendix signed by F. A. P., G. W. B.

[*Paper put in is marked by magistrate "Exhibit A, W. M. S.," for identification.*]

As soon as I learned this fact that the notes had been so pledged, I applied to Pike, notified him the notes were mine, and demanded them of him, and he declined to give them up.

Int. 4. On what ground, so far as you know, did Pike decline to surrender up for you these two notes, or either of them, or claim to hold the same as his own? State fully, and your reasons for knowing the grounds taken in this respect by Pike.

Ans. I visited Pike personally in Calais, Me., in January, 1884, or about the latter part of that month, and I conversed with him on the subject of his claim to these notes. I also saw him repeatedly after that time, both in Boston and in San Francisco, Cal., with reference to this matter. I demanded the notes of him as my property; he said they had been demanded of him in December 1883, by my agent, Frederick W. Gregory, and that written orders from Butterfield that he should give the notes up to me, had been served on him or presented to him by Frederick W. Gregory, and that he had declined to give them up on the ground that they were forfeited to him by the contract of July 31, 1883, above referred to, and that they were forfeited to him under the terms of that contract.

Int. 5. If you afterwards made any claim against Jones by reason of his having participated in the pledge of these notes to Pike, state what claim you made against Jones, and whether or not Jones executed to you any transfer or assignment of the notes or his interest therein, and if so, when. And produce this assignment, and hand it to the magistrate to be referred to as part of this deposition and marked for identification by him.

[*Objected to as calling for matter wholly irrelevant.*]

Ans. I brought suit against said Jones in Massachusetts, for the conversion of these notes by him, and caused him to be arrested, and Jones afterwards gave me an assignment of these notes, which assignment I now hold in my hand to be produced and hand it to the magistrate to be marked by him and to be referred to as part of this deposition.

[*Paper put in is marked by magistrate "Exhibit B, W. M. S.," for identification.*]

Int. 6. What further measures, if any, did you take for the recovery of these notes?

Ans. I also brought a suit in Massachusetts against Butterfield for the conversion of these notes, and caused him to be arrested in the same suit afterwards, and on the 16th of December, 1884, I brought a suit in equity against Pike *et al.* to obtain possession of these two notes in the Supreme Judicial Court of Massachusetts, Suffolk County. This suit was afterwards removed to the United States Circuit Court, Massachusetts District, and there continued to the last of November, 1886, and in that November, Pike and I entered into an agreement of submission, and that agreement of submission is the same which I now hold in my hands, and a copy of the same is annexed to the bill in case of Charles A. Gregory *v.* John G. Stetson *et al.* I now hand this submission to the magistrate to be marked by him for identification and referred to as part of this deposition.

[*Paper put in is marked by magistrate "Exhibit C, W. M. S.," for identification.*]

In consequence of making this submission, I did on the 6th of December, 1886, cause an entry of an order for the dismissal of the Equity suit, No. 2,170, Gregory *v.* Pike *et al.*, to be made in that case, and that order for dismissal I now produce, and hand to the officer, taking this deposition, to be marked for identification, and to be referred to by either party.

[*Paper put in is marked by magistrate "Exhibit D, W. M. S.," for identification.*]

On the 8th of January, 1886, Pike made an agreement running to me in writing, which I now hold in my hand. It is in his handwriting, signed by him. I now hand the same to the officer taking this deposition, and request that a copy of the same be attached to this deposition, and that the same be marked for identification, and to be referred to by either party in this suit.

[*Paper put in is marked by magistrate "Exhibit E, W. M. S.," for identification.*]

Int. 7. State the contents of that agreement briefly, and state what, if anything, was done under the same.

[*Objected to statement by the witness of the contents of this agreement.*]

In consequence of making that agreement, I will proceed to state what was done under it; but to make it more intelligible, I will briefly state the substance of that agreement.

Pike agreed therein that if I would discontinue the equity suit as against Swift, who was one of the defendants therein, that he, Pike, would not deal with the said two notes in any way, except in pursuance of my rights, as they should be determined in said equity suit, and also that the $20,334.60 note, which was then about to mature, should at once be lodged in the hands of Amos P. Tapley, of Boston, to abide the determination or result of that equity suit, and that as soon as the note should mature, a suit at law should be brought on that note by or under the joint control and direction of Thomas H. Talbot and F. A. Brooks, Talbot to act as the attorney for Pike, and Brooks as the attorney for me, and they to be paid by their respective clients. Then my attorney, acting for me, did thereupon enter a discontinuance of said equity suit as against Swift, and afterwards treated that suit as no longer pending as against said Swift, or rather afterwards, for some time. Then a suit at law was brought against Swift to recover the amount of $20,334.60 in the name of Charles F. Jones *v.* W. C. N. Swift, being case No. 2,632, in the United States Circuit Court, District of Massachusetts, intended to be under the joint control and direction of said Talbot and Brooks, these attorneys acting together in said suit as representing the plaintiff therein, and then, while Talbot and Brooks were so prosecuting that suit at law, they concluded to recommend, and did recommend by a joint letter written to Pike in my presence, that the matter of controversy between Pike and me, in order to avoid delays, should be submitted to arbitration, and then, my attorney, Mr. Brooks, and I were informed by Mr. Talbot that Pike was seriously ill, and, advising together, Talbot and Brooks (Talbot acting for Pike and Brooks acting for me) became convinced that it would be for the advantage of the parties to withdraw said equity suit, and substitute the arbitration therefor; and thereupon the agreement to

submit to arbitration was entered into and signed. Shortly after we had entered into an agreement for submission, we were informed of the decease of Pike, and we were also informed that the acts and doings of Talbot were approved and sanctioned, and were adopted and ratified by the widow of Mr. Pike, who, we were informed, was the executrix of the last will and testament of Pike, deceased. I do not mean to state in this connection the exact time and order of the information so conveyed to us by Talbot, or that it was all received at one and the same time.

Int. 8. State if you can what was done before the arbitrator under the submission, and in what way the interest of Mr. Pike, deceased, or the interest of his estate, was represented before the arbitrator, if it was so represented at all. I mean in the hearings before the arbitrator under the submission.

[*Objection to the witness stating anything of the proceedings which it is improper to show by parol evidence.*]

Ans. On Dec. 1, Mr. Talbot and I went together to Judge Hoar's office, he having been selected as arbitrator under the submission. We did not find him at his office, and by agreement with Mr. Talbot, I telegraphed to Concord, to Judge Hoar, asking him to meet us at his office the next morning, which was Thursday, Dec. 2. On Thursday, Dec. 2, Mr. Talbot and I met Judge Hoar at his office, in the morning, and we asked him to consent to act as the arbitrator under that submission, and he then and there consented to so act. On that day, Mr. Talbot was requested by Mr. Brooks to take the two Swift notes and place them in the hands of Judge Hoar, the arbitrator, and Mr. Talbot in my presence gave the notes to Judge Hoar. On the afternoon of that day, Mr. Brooks, Mr. Talbot and I appeared before Judge Hoar at his office, and the parties then entered upon the presentation of the case before Judge Hoar. This arbitration, or rather hearing, was followed up the next day on Friday, and on the following Saturday, and during that time Mr. Talbot fully and elaborately argued the case on behalf of the interest he represented, and Mr. Brooks presented my case, and the hearing was substantially concluded on that Saturday, but Mr. Brooks reserved the right to present further considerations on the subject of the Eaton note, which appeared to be a lien imposed upon the Swift

note by Mr. Pike, or was claimed to be such by Mr. Talbot. I was present all through the hearing. The next week, about the 6th or 7th of December, Mr. Talbot concluded to submit an additional brief, and both parties agreed that additional brief or briefs might be submitted. The hearing was continued along and on about the 13th and 14th of December, additional briefs were submitted to the arbitrator; then upon the 16th of December, Mr. Talbot and I made a joint request in writing to the arbitrator, that he should not make his final award without further notice to us; then upon the 18th of December, notice having been received from Judge Hoar of his readiness to announce his conclusions, Talbot, Brooks and myself attended before the arbitrator and heard the arbitrator orally announce his conclusion or decision, subtantially stating that he found the property in the notes to be the property of Charles A. Gregory, and that Pike was not entitled to hold the note as against Gregory, except so far as to protect the lien of the Eaton note. Then a discussion was had between Mr. Talbot and Mr. Brooks how the Eaton note should be produced here in Boston. I remained in Boston waiting on this matter till the evening of the twenty-second day of December, when I took the cars for Chicago. On the 20th of December, and the 21st of December, I was negotiating with Mr. Talbot about getting the Eaton note here in Boston, and how I could arrange to pay off the lien of that note. In that connection, I asked Mr. Talbot to send for the note, assuring him that I would pay the lien in order to avail of the award, as had been indicated to us orally by Judge Hoar on the 18th of December.

Int. 9. When first and how did you learn that any award in writing had been made and signed by the arbitrator?

Ans. On the twentieth of December, Mr. Brooks told me that he had the award in writing signed by the arbitrator, that he had been up to Judge Hoar's office, and that the award had been made; then on that day Mr. Brooks and I were present in Mr. Talbot's office, and Mr. Harvey, who resides at Calais, Me., was present there and Mr. Talbot. On this twentieth day, my recollection is that I met Mr. Harvey in the forenoon, at Mr. Talbot's office, and we conversed very fully upon the subject of the conclusions that Judge Hoar had announced orally on the Saturday previous, and

they were made known to Mr. Harvey. Mr. Harvey was introduced to me by Mr. Talbot, and represented to me by himself and Mr. Talbot as acting as attorney for the Pike estate, and the interview that I have spoken of, where Mr. Brooks was present at Mr. Talbot's office occurred on Tuesday, the twenty-first day of December, and not on the twentieth as I stated above; but I was there on both of those days, both Mr. Talbot and Mr. Harvey present. Before I left for Chicago, Mr. Harvey promised that he would send for the Eaton note so that I could pay off the lien, and I went to Chicago for the purpose of getting the money to do so. On the twenty-first of December, Mr. Brooks told Mr. Harvey in my presence, at Talbot's office, that Judge Hoar had made his award in writing, and they had discussion upon that matter.

[*The parties here agree that the original award of the arbitrator, all of which excepting the date, and an interlineation therein, is in the handwriting of Alfred S. Hall and may be put in evidence by a copy thereof now handed to the magistrate marked "Exhibit F, W. M. S.," and the same is so put in evidence, and this copy may be referred to by either party without being annexed to the deposition.*]

Int. 10. Please look at the copies of the award and the submission attached to the bill of complaint in the suit Gregory *v.* Stetson, and state whether or not they are correct copies of the submission and the award.

Ans. Exhibit No. 1, Exhibit No. 2 attached to the bill in case, Gregory *v.* Stetson, are true copies of the original award and the original submission; they are in my handwriting. I made them myself from the originals. The original award bears the signature of Judge Hoar; the signature is in his handwritting; his handwriting is well known to me.

[*Objection made to any proof of the award until its making and publication are properly established.*]

Int. 11. Please look at the paper now shown you, purporting to be the original award by the arbitrator, under the submission entered into between you and Pike, under date of Nov. 30, 1886, and state what it is, and by whom it was signed.

[*Same objection as last stated.*]

Ans This paper that I hold in my hand is the original award as

made by the arbitrator. I am familiar with the handwriting of Judge Hoar, the last two lines and signature are in the handwriting of Judge Hoar, and also an interlineation in the fifth line is in the handwriting of Judge Hoar.

Int. 12. Whether or not at any time after you were informed by your counsel that this award had been made and signed by the arbitrator, you had any conversation with Mr. Harvey which referred to the fact of such award; if yea, what was such conversation?

Ans. While I was in Boston, before I left for Chicago on the 22d of December, I saw Mr. Harvey repeatedly; he was part of the time staying at the same hotel with me; saw him at the Crawford House, where we both stayed; also at Talbot's office and other places. We had conversation upon the subject of this award. He told me he had been at Judge Hoar's office and had read the award, and this was after Mr. Brooks informed me and Harvey that the award had been completed and had been signed. He also told me that he and the parties he represented were bound by the submission; he expressly said this to me and I reported the same to Mr. Brooks at his office as relieving me of some anxiety, lest Mr. Talbot and Mr. Harvey should attempt to go behind the submission, after they found out what the award was.

Int. 13. Whether or not any evidence was produced before the arbitrator in your behalf for the purpose of showing that Pike had lost any right or title to the Swift notes, by reason of the failure or declination of the Union Trust Company to deliver to Butterfield the bonds of the May Lundy Company so called of London?

[*Objection made that the evidence produced cannot be shown by parole.*]

Ans. After the arbitrator in the early part of the hearing had carefully perused contract of July 31, 1883, between Pike and Butterfield, he read to us the clause referring to the fact that non-delivery to Butterfield of the May Lundy bonds would render the agreement void, and asked us if we had any evidence on that subject; he stated that it was a very important point, and wanted to know if we were prepared on that point. We said we had no evidence then to offer on that point, and did not then rely upon it

at that hearing. And no evidence was adduced before the arbitrator on that point, and his decision did not turn upon that point.

[*Objection that the witness's statement is an oral statement of what appears in a written document, and is an incorrect statement as a reference to the document itself will show. The non-delivery of the bonds itself not being sufficient to avoid the contract, that is without seasonable notification to Pike.*]

Int. 14. Was there any allusion, either by evidence or in the remarks of counsel before the abitrator, to the failure of the Union Trust Company to deliver the May Lundy bonds as a ground or reason of your claim to the ownership and possession of these notes of Swift?

Ans. There was not. It was entirely excluded as a ground or reason of my claim to those notes at that hearing.

Int. 15. It appears from the award that you were required to assume and pay the amount of the Eaton note in order to entitle yourself to the possession of delivery from the arbitrator of the two Swift notes: what action, if any, did you take under or in consequence of this part of your award?

Ans. Before I went to Chicago it was agreed by Mr. Talbot and by Mr. Harvey that they would send for the Eaton note, it then being out of their possession. I went to Chicago to get the money, and arrived back here in Boston on the third day of January; and on that day I was informed by Mr. Talbot that he could produce the Eaton note to me, and I offered on that day to pay it. On the 4th of January, I paid the money, which represented the full amount of that note, principal and interest into Mr. Talbot's hands, and received the note from him into my possession.

Int. 16. Between the time of your leaving for Chicago, Dec. 22, and your return here, Jan. 3, what had been done by the arbitrator with the Swift notes?

[*Objected to, because it calls for information which is not within the personal knowledge of the witness.*]

Ans. I learned, on my return to Boston, that the notes had been taken out of the hands of the arbitrator by the joint action of Mr. Talbot and Mr. Brooks, and had been placed in the hands of John G. Stetson, the person who was then and now is the clerk of the

United States Circuit Court of Boston, and I hold in my hand the receipt therefor, signed in the handwriting of John G. Stetson: it is dated Boston, Dec. 24, 1886; and a true copy of the same is set forth at length in the bill of equity in the case of Gregory *v.* Stetson. I took this receipt to Mr. Stetson personally, and informed him that I had paid the Eaton note, that is to say, the lien represented by the Eaton note, and I requested of him to deliver up the two Swift notes for which he had receipted by that receipt, and he declined to give it up.

[*This receipt is handed to the magistrate, and is marked by him "Exhibit G, W. M. S.," for identification, and may be referred to by either party.*]

Mr. Brooks was present with me at the same time, and made the same demand of Stetson for said notes, and the same refusal was made.

Int. 17. Whether or not the larger of these two Swift notes, viz., that of $20,334.60, was afterward surrendered by Stetson, with your consent, to be filed in the suit at law, Jones *v.* Swift, No. 2,632, in the United States Circuit, in which case the amount of said note had been paid into Court by said defendant in satisfaction of said note?

[*Objection to the question, except so far as it relates to the consent.*]

Ans. I was present in court, and saw the same so surrendered and filed, and it was done with my consent.

The counsel for plaintiff, Gregory, now gives notice to the defendant, that he no longer claims to recover this larger note of $20,334.60 in the suit against Stetson in the State court of Massachusetts, but will execute a disclaimer as to said $20,334.60 note, and file the same in the suit, Gregory *v.* Stetson, in the Supreme Judicial Court of Massachusetts.

In reply to the suggestion of the defendant's counsel, that it should be done by a modification of the pleadings in said suit, the counsel for Gregory says that the pleadings on his part have been closed, and that this surrender of the larger note by Stetson has taken place since that time.

Int. 18. Whether or not after Jan. 1, 1884, when the contract by Butterfield with Pike for the purchase of the mining property

matured, Pike treated the mining property bargained by Butterfield as his own. State your knowledge on this subject.

Ans. I know from Mr. Pike by his statements to me that he offered the property for sale repeatedly to several different agents. He offered the same property to me for sale. Some time in January or February, 1884, he made to me an agreement on certain terms to sell the property to me. This agreement was in writing, but I have it not with me at this time, and I will produce it as soon as it comes into my possession, which will be in a few days.

[*Mr. Talbot objects to the statements as to an agreement between Gregory and Pike, relating to the deposit of one of the Swift notes with one Tapley, and as to the suing of said note when it should mature, because that matter is wholly irrelevant to the issue. He objects also to any testimony of information received from his counsel, Mr. Brooks, as tending in any way to establish the truth of the statement said to have been so received from Mr. Brooks. He also objects to any statement of the witness as to the conversation with the late defendant, Pike, now deceased, such statements of the deceased not being admissible in evidence.*]

Int. 19. Will you produce and put in evidence a subpœna issued in the case of Gregory *v.* Stetson to Mary H. Pike, of Calais, Me., for the purpose of making her a party to the bill of complaint in that case, on which is indorsed the return of the officer as to the service of said subpœna, and hand the same to the magistrate to be marked by him and annexed to this deposition, or to be referred to by either party without such attachment to the deposition?

[*Objected to as calling for matter wholly irrelevant to the issue and not within the knowledge of the witness.*]

Ans. I hold in my hand and produce what purports to be the original writ of subpœna directed to Mary H. Pike, of Calais, Me., together with the indorsement of the deputy sheriff, and indorsement of service of the same by the deputy sheriff upon Thomas H. Talbot in the suit inquired of. The said Thomas H. Talbot is described as the agent or attorney of said Mary H. Pike in the indorsement so made by the officer, as appears by said paper.

[*Paper put in and marked by the magistrate, "Exhibit H, W. M. S." for identification.*]

Int. 20. State, if you know, what was done by the defendant Stetson with the Swift note of $20,334.60 deposited with him Dec. 24, 1886, as above mentioned, and if you say that said note was placed on file in the case of Jones *v.* Swift, No. 2,632 in the United States Circuit Court, state the reasons why you consented to this being done, and also the circumstances under which the same was done.

[*Mr. Talbot objects to the statement of any reason operating upon the witness, unless the same were made known to the adverse party in interest at the time when the consent was given.*]

Ans. On the morning of Jan. 10, 1887, I was present in the United States Circuit Court, then holden in Boston; Mr. Brooks was present also. Thomas H. Talbot was present; John G. Stetson was present, and Judge Lowell was present. Now up to that time the note inquired of was in the possession of Mr. Stetson, as I have previously stated. I had been informed that Mr. Talbot had separately and apart, without the consent of Mr. Brooks, made and arranged with Swift, by which arrangement Swift paid the money into court on the $20,334.60 note before the note was filed in that suit at law, No. 2,632, and while Talbot was still unable to produce that note, according to our agreement as shown by the receipt of Stetson. Mr. Swift was there, moving to have the note given up and cancelled, or that he should withdraw the money, if the note was not filed as evidence that the same was paid by the money paid into court. I and my attorney refused to allow the note to be filed or cancelled, insisting that the note should remain in the custody of Stetson until it could be determined in the suit of Gregory *v.* Stetson, to which of the two parties, Mary A. Pike, executrix, or myself, the said note belonged. Then it was proposed by Mr. Talbot and Judge Lowell that the money so paid into the court should be transferred to the suit on the equity side, No. 2,170, of Gregory *v.* Pike, and I consented to this, with the understanding between us that the money should stand in lieu of the note, and that my rights to the same should remain as though the said note still remained in the possession of said Stetson. Mr. Stetson asked me if I consented to that, and I gave my consent.

Int. 21. If you have executed and delivered to the defendant, Stetson, or his attorney, a release of all claim against him under the receipt of Dec. 24, 1886, for the $20,334.60 Swift note since the adjournment of yesterday, please state that fact, and state what action was taken by Mr. Talbot as defendant's attorney in the suit.

Ans. I have signed and delivered to Mr. Talbot, as attorney for John G. Stetson, a release such as is inquired of, bearing date April 25, 1887. It is now in Mr. Talbot's possession; he has taken the same and put it in his pocket in my presence.

[*The bond or agreement given by Pike to Gregory, Jan.* 23, 18 4, *of the May Lundy Mining Property, mentioned by the witness in his answer to Int.* 18, *is now produced by him and marked by the magistrate for identification, "Exhibit I. W. M. S."*]

Int. 22. Whether or not, during the progress of the hearing before the arbitrator under the submission, you had any conversation with Mr. Talbot in regard to any instructions or actions taken by his clients in Calais upon the subject of the submission which had been entered into and executed on the part of Pike by Mr. Talbot, as his attorney, under date of Nov. 30, 1886? If so, state what that conversation was.

[*Objected to that such instruction or action cannot be proved in the manner in which the question proposes it to be.*]

Ans. During the progress of the hearing, I called upon Mr. Talbot at his office, to ascertain whether he was intending to proceed with the hearing under the submission. This was after he had informed me of the death of Mr. Pike, and he told me that he was fully authorized by all parties interested to proceed with the submission. I think it was then that he told me that Mary H. Pike was to be the executrix under the will of Pike, deceased, and further, he read to me then a portion of a letter which he held in his hand, and said he just received from Maine, written by Mr. Harvey to him. The substance and purport of what he read to me was this: "Mr. Harvey assured him in the letter that he, Harvey, was authorized in the fullest manner to say to Mr. Talbot, that his action in the matter of the submission was fully approved, and that he could proceed with the submission, or rather under the agreement therefor, I mean to say proceed with the hearing under the submission."

[*Statements of the contents of the letter objected to. In view of this objection of Mr. Talbot, to the witness giving the contents of a letter now in his, Talbot's possession, or in his possession in December last, when read in part to the witness, the counsel for Gregory gives notice to Mr. Talbot, both personally, and as attorney for the plaintiff, to produce the letter received by him from Mr. Harvey, or the letter, a part of which was read to him by the witness, December last.*]

Cross Examination by Mr. Talbot.

Cross-Int 23. In your answer to Int. 3 you say you placed the shares therein mentioned with George W. Butterfield, to dispose of the same by sale to W. C. N. Swift. What was your purpose in doing this?

Ans. It was to realize on the shares for my benefit.

Cross-Int. 24. What use was to be made of the proceeds of that sale?

Ans. They were to be mine to use as I pleased.

Cross-Int. 25. What use, if any, was Butterfield to make of these proceeds?

Ans. He was to deliver the entire proceeds to me.

Cross-Int. 26. When was he so to deliver them?

Ans. As soon as the sale was to be made.

Cross-Int. 27. When was the sale made?

Ans. It was made in my absence. I had departed for Chicago early in April; the notes bear date the 4th of April, and I have always assumed the transaction was completed on that day. A day or two after the 4th of April, he remitted to me at Chicago, that is Butterfield did, the cash part of the proceeds of that sale, $5,000.

Cross-Int. 28. Why were the notes left in his hands?

Ans. The notes were delivered to me by him as soon as I returned from Chicago: I returned about the 8th of April.

Cross-Int. 29. If you did not retain the notes in your possession, but handed them back to Butterfield, what was your purpose in doing so?

Ans. On the 9th of April, it was by arrangement with Mr. Butterfield allowed me an option whether I would take an eighth interest in his May Lundy enterprise, so called, and as I intended to go

to London with him, I left the notes with him as security that I would pay him $10,000, if I concluded to go into the enterprise.

Cross-Int. 30. Was not your going in to the May Lundy enterprise a part of your intention or contemplation when you first put the stock into Butterfield's hands for sale?

Ans. I had not then agreed to go into the enterprise, but I wished to convert my shares into money or interest-bearing securities and be in condition to go into it, if I chose afterwards.

Cross-Int. 31. Is not this a part of your testimony as previously given in equity cause No. 2,170, Gregory *v.* Pike?

"*Cross-Int.* 22. At whose suggestion was the sale of stock mentioned by you made to Mr. Swift, and for what purpose was it suggested and made?"

Was that interrogatory put to you, and did you answer as follows?

"Mr. Butterfield and Mr. Jones suggested that if I should sell that stock to Mr. Swift, it would enable me to obtain means to assist them in carrying out their enterprise to sell said mines. My object was to convert my stock into money or interest-bearing security. I consented to a sale for that purpose to convert my stock into money or interest-bearing security. I had in contemplation to assist these gentlemen in their enterprise."

Ans. I do not remember the questions and answers in that deposition referred to.

Cross-Int. 32. Will you be good enough to state whether your answer as above recited is or is not a correct statement of fact?

[*Objected to because the witness is not called upon to testify to any matter of fact, but is called upon to assume that the question and answer contained in a deposition given by him some years ago, as printed in record, are correctly printed, and that the answer as then made, if correctly printed, was at that time correct and is now correct in fact, which question is one which the witness is not called upon to answer, and is advised by his counsel not to answer, because this mode of conducting the examination, if admissible, would be interminable and would contain matter wholly irrelevant.*]

Ans. Under the advice of my counsel and for the purpose of saving time I decline to answer; but I see nothing in the answer as quoted contrary to the fact.

Cross-Int. 33. What was the enterprise of Butterfield and Jones in which you contemplated assisting them?

Ans. The enterprise proposed to me by them was the sale of a group of mines, for brevity, called the May Lundy Mines.

Cross-Int. 34. Did you contemplate such assistance when you transferred your stock to Butterfield?

Ans. The project had been proposed to me and I thought it possible that I might take an interest in it thereafter.

Cross-Int. 35. Was your transfer of the stock to Butterfield made for the purpose of procuring means to forward that enterprise?

Ans. Not solely. It was for my own benefit. With the expectation that I might afterwards go into the enterprise.

Cross-Int. 36. From whom was the title to these May Lundy Mines to be derived?

Ans. I was informed by Butterfield that it was to be derived through Pike, and that he had made an agreement to purchase the same from Pike.

Cross-Int. 37. Were you informed by Butterfield of the date of the agreement which he held from Pike as mentioned in your last answer?

Ans. I did not know as I was informed as to the date. I mean that I do not remember now that I was so informed.

Cross-Int. 38. Did you, on or before April 9, 1883, enter into an oral agreement with Butterfield by which you were to have a certain interest in the profits of the property bargained by Pike to him when a sale could be effected?

Ans. Such an interest was offered to me, and I may say that I expected to take it, but I had not committed myself, and I was left at liberty to say whether I would sign an agreement to that effect or not.

Cross-Int. 39. Did you afterwards sign an agreement to that effect?

Ans. I did sign an agreement dated May 1, 1883.

Cross-Int. 40. Will you please to refer to the equity suit No. 2,170, Gregory *v.* Pike, and inspect copy A as it appears on page 149, and say whether that is a copy of the agreement which you have just stated had been signed by you?

[*Objected to, first because it relates to a matter not in issue in this case, but which took place apparently before the cause of action in this case arose or accrued; secondly, because the question asks the witness to furnish evidence of the contents of an instrument in writing, without producing such instrument in writing or showing his inability to do so, and without enabling the witness to answer the question, even if he were disposed to answer it.*]

Ans. I decline to refer to the copy, or to answer the question.

Cross-Int. 41. Have you the original paper signed by you on May 1, 1883, as a memorandum of agreement between Butterfield and Jones of the first part and yourself of the second part?

[*Objected to as immaterial.*]

Ans. I have it not in my possession.

Cross-Int. 42. Where is it?

[*Objected to as immaterial.*]

Ans. I do not know where it is at this moment.

Cross-Int. 43. Where was it at your last knowledge?

[*Objected to as immaterial.*]

Ans. It was in the possession of my counsel.

Cross-Int. 43½. Will you produce it and furnish it to the magistrate to be made a part of this deposition by annexation or by reference?

Ans. I decline to do so.

Cross-Int. 44. What proportionate interest were you to have, if any, in the profits of the purchase and sale of property, which was the subject of agreement between you and Butterfield and Jones?

[*Same objection.*]

Ans. I decline to furnish the evidence.

Cross-Int. 45. Did you know at any time before July 31, 1883, when the right which Butterfield had to complete the purchase of this property from Pike would expire?

Ans. I understood it was to expire on the thirtieth day of July, 1883.

Cross-Int. 46. How early did you have this knowledge?

Ans. In the month of April, before I left for Europe; April 9, 1883.

Cross-Int. 47. What was your purpose in going to London to meet Butterfield?

Ans. I intended that in the event I should go into the proposed arrangement, regarding taking an interest in the sale of the May Lundy Mines, to be there with him to assist him in that sale, or to assist him in making such sale.

Cross-Int. 48. How long did you remain there engaged in that business?

Ans. His right to make such sale expired on the 30th of July. I remained there up to the 30th of July, and I continued in London thereafter till the 1st of January, 1884.

Cross-Int. 49. What was your business there after the 30th of July?

Ans. I remained after that to see what I could do in assisting Mr. Butterfield in regard to disposing the mining property he was interested in.

Cross-Int. 50. What mining property was that?

Ans. The mining property described in the contract of July 31, 1883, between Pike and Butterfield.

Cross-Int. 51. Did you know personally of the making of the original Swift notes which you have mentioned, or the latter note, for which the original notes were changed, as you have stated?

Ans. I never knew of the making of the exchange notes which bore date April 20, 1883, until some time in December, 1883. I only know of the original notes being made by their coming into my possession as made by Mr. Swift.

Cross-Int. 52. Were those original notes placed in the hands of Jones, as you have stated, with your knowledge and consent?

Ans. They were sent over to Boston by Mr. Butterfield in a package which he delivered to Mr. F. H. Williams in New York for the purpose of having the notes carried to Boston. In the envelope containing the notes was placed a slip of paper of my writing. I knew that they were to go to Boston.

Cross-Int. 53. Did you know or not that they were sent over to Boston to be delivered to Jones?

Ans. I considered them in the control or keeping of Mr. Butterfield. I had no objection to their going to Mr. Jones.

Cross-Int. 54. You say that in December, 1883, you learned that those two notes had been deposited with Pike; how long after Butterfield's arrival in London did you learn that fact?

Ans. I do not remember how long, but very soon after Butterfield's arrival there. I learned it from Mr. Kemp first.

Cross-Int. 55. Did you make any demand upon Pike for those notes jointly with J. C. Kemp, sometimes called Kemp Van Eé?

Ans. I wrote a letter to Mr. Pike, dated Dec. 11, 1883, in which I requested him to deliver the two notes to my brother in Boston for me. In that letter J. C. Kemp joined in the request that the notes should be delivered to me.

Cross-Int. 56. Is that the letter which appears in the equity suit No. 2,170 on page 13, — appears by copy?

Ans. That appears to be a copy of the letter. That letter and Mr. Kemp's joining in the same with me was written because I wished to prevent Mr. Pike's refusal to deliver the notes to me to be placed upon any possible ground that Kemp might assert a claim to one of these notes, or any portion of it, and so appear to afford a justification for Pike to refuse to deliver them to me through my brother. I do not admit that Mr. Kemp had any valid claim to any portion of either of those notes.

Cross-Int. 57. How long before that date, Dec. 11, had you learned of the deposit of the notes with Pike?

Ans. It was probably within a week before that letter was written. Kemp and Butterfield reached London early in December. I cannot speak accurately of the date of their arrival.

Cross-Int. 58. Did you make more than one visit to Calais in January, 1884; if only one, when was that made?

Ans. I must have visited Calais about the 20th, of January, 1884, and I did not go there but once.

Cross-Int. 59. When did you bring suit against Jones for the conversion of the Swift notes, and in what did you allege such conversion to have taken place?

Ans. It was in November, 1884. I do not remember the allegation of the complaint.

Cross-Int. 60. Did you not declare on the change of the notes with Swift of April 20, 1883, as the act of conversion complained of?

[*Objected to as immaterial.*]

Ans. I do not remember.

Cross-Int. 61. Did you bring suit against Butterfield for the conversion of these notes?

Ans. I have so stated in this deposition.

Cross-Int. 62. Was your bill against Swift in suit 2,170 ever dismissed as against Swift?

Ans. As to that, the record will show, but I may state that my knowledge is that my counsel attempted to dismiss it and did what he thought was sufficient for that purpose. In that connection, I add that Mr. Swift objected to the dismissal of the bill as against him, and the effect of the attempt of dismissal, and the effect of Swift's objection to such dismissal, is matter of record and matter of law.

Cross-Int. 63. Did you give any such agreement to Pike with regard to the deposit of the notes with Tapley, and the bringing of suit on the larger note when it matured, any such agreement as you have shown in your hands from Pike, being Exhibit E, dated Jan. 8, 1886?

Ans. The only agreement in that connection that I know of is evidenced by that Exhibit E.

Cross-Int. 64. Did you ever demand under that agreement that the note therein mentioned should be deposited with Tapley, as therein specified?

Ans. I never did, personally.

Cross-Int. 65. Did you, so far as you know, make such demand by your counsel?

Ans. Not so far as I know.

Cross-Int. 66. Have you any knowledge that the note was so deposited with Tapley?

Ans. I have no knowledge that it was.

Cross-Int. 67. In your direct testimony you speak of a joint letter written to Pike by Talbot and Brooks, recommending a submission to arbitration of the controversy then existing between Pike and you; do you mean to say one letter was written and signed by both?

Ans. I mean to say a letter was written, and in that letter both Mr. Brooks and Mr. Talbot joined in a recommendation to Mr.

Pike to submit the matters therein referred to to arbitration. The letter was written by Mr. Brooks, and will show itself what it further contains.

Cross-Int. 68. By whom was that letter written?

Ans. The main body of the letter was written by Mr. Brooks. The letter was read in the presence of Mr. Talbot, and he said he concurred and would further write himself an approval, and my impression is that he did so then and there, and he took the letter away, I think, and said he would mail it to Mr. Pike?

Cross-Int. 69. On Dec. 2, when you say that you and Talbot called on Judge Hoar, and he consented to act as arbitrator, did he say anything about the submission likely to be of no use or effect?

Ans. I do not remember that he did at that date, but after we learned of the death of Mr. Pike there was something said upon that subject, and we were in hopes to hear that the submission would be ratified or approved by the parties in interest down at Calais.

Cross-Int. 70. Were you present when Mr. Brooks proposed to Mr. Talbot his manner of opening the case before the arbitrator?

Ans. I was present at all the proceedings before the arbitrator.

Cross-Int. 71. Did not you and Mr. Talbot go before Judge Hoar, on Thursday, Dec. 2, and leave with him the record in 2,170, to be read by him by way of preparation for the hearing of the case, Mr. Brooks not being present?

Ans. My impression is Mr. Talbot and I went together without Mr. Brooks in first instance, and each of us made a brief statement of the matter, and gave to Judge Hoar the printed record in 2,170 for him to read for the purpose of hearing the arbitration. This was in the morning of Dec. 2.

Cross-Int. 72. On the same day, and very soon thereafter, did not you and Mr. Talbot find Mr. Brooks at the United States Court room, and there communicate to him what had been done before Judge Hoar, as just stated by you?

Ans. We did go somewhere together and find Mr. Brooks and communicate the fact to him, as stated in the inquiry.

Cross-Int. 73. Did not Mr. Brooks express his dissatisfaction with that manner of opening the case, and propose that himself and Mr.

Talbot should go before Judge Hoar and informally open the case to him as arbitrator?

Ans. There was no particular dissatisfaction expressed, but we all went together before Judge Hoar and further prosecuted the hearing.

Cross-Int. 74. Did not Mr. Brooks at that time propose that there should be an informal opening of the matter before Judge Hoar?

[*Objected to as immaterial.*]

Ans. I have no particular recollection of any formality or informality about it; we entered upon our case and prosecuted it in the afternoon of that same day.

Cross-Int. 75. Did Mr. Brooks thereupon proceed to a regular and formal opening of the case?

Ans. It is a matter of judgment whether it was regular or formal; we opened the case and prosecuted it.

Cross-Int. 76. Who commenced the presentation of the case before the arbitrator?

Ans. There was a general discussion of it that day; that is all I can state on that subject. We considered we had the affirmative of the case, and proceeded to open it under the submission in favor of myself.

Cross-Int. 77. In that opening did Mr. Brooks hand to Mr. Talbot, or show to him in any way, the printed brief which he afterwards exhibited when he came to his closing argument?

[*Objected to as immaterial.*]

Ans. I do not remember whether he did or did not.

Cross-Int. 78. You speak of a request which you and Mr. Talbot put in to the arbitrator on the 16th of December; was it not to this effect, that, after the arbitrator should have formed his opinion upon the merits of the case submitted to him, he should not put the award into formal and final shape without a hearing of the parties as to that matter?

Ans. The request to the arbitrator was in writing, and I cannot state now what was the form of it.

Cross-Int. 79. Did not you write it yourself?

[*Objected to as immaterial.*]

Ans. I wrote it in the presence of Mr. Talbot, and he joined in it in writing.

Cross-Int. 80. Can you not state its substance?

Ans. I have spoken of its purport above and my memory is the same, I mean in this deposition. I do not think the question properly expresses the terms of our request. We did not expect any further hearing upon the merits of the case.

Cross-Int. 81. My question does not refer to any further hearing upon the merits of the case, but simply that the parties should be allowed an opportunity to express their views as to the shape of the award, after the arbitrator had determined and announced his determination of the merits of the case. Was that not what was requested in the paper?

Ans. I have spoken as far as I can of the contents of the paper already. But I will add that about the 17th of December, or the 18th of December, we received notice, Talbot and I and Mr. Brooks, that the arbitrator was ready to announce his conclusion of the decision, and on the 18th of December, Mr. Brooks, Talbot and myself went before the arbitrator, and we spent a long time there with the arbitrator, and he announced his final conclusion upon all the points relating to the matter submitted to him.

Cross-Int. 82. Did not Judge Hoar, as early as Dec. 4, intimate to the parties an inclination of a feeling on his part to make a distinction between Pike's claim to hold the Swift note as security for the Eaton note, and his claim to hold them on his own account?

Ans. I think he did not.

Cross-Int. 83. Did not you, during the week commencing Dec. 5, have more than one interview with Talbot, in which you expressed your wish as to the form of the award, and the way it should be carried out under the expectation that the arbitrator would allow Eaton's claim and disallow Pike's own claim?

Ans. I think I did. I concluded from the information given by Judge Hoar as early as Dec. 4, that he would impose a lien upon the Swift note in the hands of Pike to the amount of the Eaton note, and from that time on I negotiated with Mr. Talbot as to how I might arrange to discharge that lien.

Cross-Int. 84. Do you recollect that Talbot made any special

statement to the arbitrator when he handed to him the Swift note?

Ans. I do not remember any special statement.

Cross-Int. 85. You have stated that on the 20th of December you were informed by Mr. Brooks that an award had been made; please state, as fully as you can, what Mr. Brooks said to you. What did he say about the manner in which the award had been made?

Ans. I think you are incorrect in saying that I have stated that that was made on the twentieth day of December; it was made either the 20th or 21st.

It was well known to me and Mr. Brooks on the eighteenth day of December, from what Judge Hoar then communicated to us in the presence of Mr. Talbot, what the substance of the award, speaking of the award of the final decision of Judge Hoar, was. The precise words, which Mr. Brooks communicated to me the fact that he had the award in writing on the 21st, I do not remember, only that the award was in conformity with the decision of Judge Hoar, and that it had been made in writing and handed to Mr. Brooks.

Cross-Int. 86. Did Mr. Brooks inform you who drew up the award.

Ans. Well, I do not think he did at the first time.

Cross-Int. 87. Who is Alfred S. Hall, and what is his occupation and place of business?

[*It is here agreed by counsel for Gregory that the formal award signed by Judge Hoar, Dec.* 20, 1886, *was drawn by himself or under his direction, Mr. Hall acting as amanuensis for him, and that it was not materially altered by Judge Hoar, except by the addition of the date and one interlineation in the body of the instrument, and that the date attached by Judge Hoar to this instrument was Nov.* 30, 1886, *the date of the submission, and not Dec.* 20, *the date of its actual signature. The reason for this being that Mr. Pike had died between the date of the submission and the date of the actual signature to the award by the arbitrator, and that Mr. Talbot was not present when the award was drawn and submitted to Judge Hoar.*]

Cross-Int. 88. Have you the Eaton note with you?

Ans. It is in the hands of my counsel.

Cross-Int. 89. Will you please produce it?

Ans. I see no occasion to do so.

Cross-Int. 90. Were you present when Judge Hoar gave the Swift note to Mr. Brooks and Mr. Talbot, on Dec. 24?

Ans. I was not.

Cross-Int. 91. Were you present when Judge Hoar handed to Mr. Talbot and Mr. Brooks the paper which you call an award?

Ans. I was not.

Cross-Int. 92. In your numerous conversations with Harvey did he tell you of other parties than Pike interested in these notes of which Pike calls himself the nominal owner, or rather of which Pike represented himself the nominal owner?

Ans. It was known to me and it was known to Mr. Harvey that there were several persons who claimed to be equitably interested in the May Lundy Mines, of which Mr. Pike held the title, and in the conversation and conversations with Mr. Harvey, he simply made allusion to them as persons interested.

Cross-Int. 93. Do you know the names of any of those persons? If so, please state them.

Ans. In the course of these negotiations, I have heard the names of some parties who claimed equitable interest in the mining property. I do not know who all those persons are, but I can recall the names of some. I have heard that a Mr. Todd, not otherwise knowing anything about the Todds, was interested. I have heard that a man by the name of Sawyer was also interested.

CHARLES A. GREGORY.

EXHIBIT A, W. M. S.

Memorandum of Agreement made this thirty-first day of July, A. D. 1883, *by and between* G. W. BUTTERFIELD, *of San Francisco, Cal., on the one part, and* F. A. PIKE, *of Calais, Me., of the other part.*

Witnesseth: That the said Pike agrees to sell, and the said Butterfield agrees to buy all of said Pike's interest in the May Lundy Mine, being five hundred and thirty-two nine-hundredths, and of the Lake View and Lucky Morton mines, being the whole of said two mines last mentioned, for the sum of two hundred forty-two thousand six hundred and sixty-six dollars ($242,666), payable as hereinafter stated; to wit, twenty-five thousand dollars ($25,000) at the time of this agreement and the remainder of the purchase money, to wit, the sum of two hundred and seventeen thousand two hundred and sixty-six dollars ($217,266), on or before the first day of January, A. D. 1884. And said Pike on his part agrees, when requested by the said Butterfield, to execute deeds of his interest in the said mine as above stated, running to the May Lundy Mining Company, Limited, of London, or to such party in New York as may be mutually agreed upon, and to lodge said deeds in the Union Trust Company of New York, in escrow, and to remain in escrow until the said Pike is fully paid the sum mentioned, and is also paid the sum of eight thousand eight hundred and twenty-five dollars ($8,825), being the proportion of the indebtedness on the May Lundy Mine, which belongs to the said Butterfield to pay, and, upon these payments having all been made, the deeds of said property, so lodged in escrow in said trust company, are to be held by said trust company free of claims by said Pike thereupon.

And the said Butterfield, on his part, further agrees that all the above payments shall be made on or before the first day of January next, and in case the payments are not made, as above stated, on the first day of January next, the sums of money which shall, previous to that time, have been paid by the said Butterfield to the said Pike, under this agreement, shall be forfeited; the deeds lodged in escrow

with the said company, the day after, shall be delivered to the said Pike, and this agreement, to all intents and purposes, shall be at an end. It is further agreed that until the said Butterfield shall make all the above payments specified, the mining property is to remain as at present, in the possession and control of the said Pike, who may continue to work the same for the benefit of the present owners thereof; and should all the payments before specified be made before the termination of the present contract for hauling ore, the said Butterfield agrees to assume and carry out the same contract; and should there be any ore left at the mine at the time of taking possession of the property, he shall pay the said Pike for the same at the cost thereof. And it is further agreed that Charles N. Fox and W. B. Kellogg, of San Francisco, who are owners of two hundred and nine nine-hundredths of the May Lundy Mine, may become parties to this agreement within thirty days from date, by lodging their deeds in escrow with said trust company, properly executed, conveying their interests in the May Lundy Mine to said May Lundy Mining Company, and should the deed of said Fox and Kellogg be so lodged in said trust company within thirty days from date, the said Butterfield agrees to pay them therefor the sum of sixty thousand nine hundred and fifty-eight dollars ($60,958), on or before the first day of January next; and should that sum not be paid at said time, the said deed is to be returned to said Fox and Kellogg on the second day of January next.

And it is further agreed, in case the said Fox and Kellogg lodge their deed as aforesaid, it shall constitute but one transaction in this, that the payment shall not be made to the said Pike unless it is made to Fox and Kellogg, nor to the said Fox and Kellogg unless it be made at the same time to the said Pike; but the payments are to be made to both or neither. All the above payments to said Fox and Kellogg and said Pike are to be made to said Union Trust Company or to its correspondent in London. In case the said Fox and Kellogg shall not become parties to this agreement, or in case the Union Trust Company decline to deliver the bonds of the May Lundy Mining Company to said Butterfield, this agreement shall be void, and the money paid shall be returned to said Butterfield. The

action of the Trust Company is to be ascertained and reported to said Pike within thirty days from date.

Signed by the parties thereto on the day above written.

G. W. BUTTERFIELD.
F. A. PIKE.

For the first payment of $25,000, specified in the above agreement, the said Butterfield has lodged in the hands of said Pike the notes of W. C. N. Swift, of New Bedford, dated April 20, 1883, for $15,000 and $20,334.60, payable in two and three years from date, which notes are to be held by said Pike until Jan. 1, 1884, unless sooner redeemed by said Butterfield by the payment of $25,000, and at that time the said Pike is authorized to raise $25,000 out of them by pledging them on the most favorable terms he can obtain.

F. A. PIKE.
G. W. B.

EXHIBIT B, W. M. S.

I, Charles F. Jones, of the city and county of San Francisco, in the State of California, in consideration of one dollar and other valuable considerations given and paid to me by Charles A. Gregory, of Chicago, in Cook County, Illinois, the receipt whereof is hereby acknowledged, do hereby give, grant, transfer, assign, and convey, bargain and sell unto the said Charles A. Gregory and his heirs, executors, administrators, and assigns, all my estate and property, real and personal and mixed, of any and every kind, and wheresoever situated, and whether in my possession or in the possession of any other, at law and in equity, a part of which estate and property only is herein specified, such specific part being all and any estate and interest belonging to me in any notes signed by W. C. N. Swift, and in any claims against George W. Butterfield, in or for any stock in the West May Lundy Company (Limited) in England, or for any money, loans, or any estate or property whatsoever, and all other estate and property at law or in equity, and all the appurtenances thereto in any wise appertaining or belonging.

To have and to hold the said estate and property, real, personal

and mixed, to the said Charles A. Gregory and his heirs, executors, administrators and assigns, to his and their own use and behoof forever.

And I also hereby appoint the said Charles A. Gregory my true and lawful attorney for me, and in my stead, to collect, sue for in any court or courts at law or in equity, receive, receipt for, and discharge for, any estate or property hereby granted, and to do all things with power of substitution, which I could do if personally present.

And I moreover hereby covenant, promise and agree to and with the said Charles A. Gregory to make, execute and deliver to him and his heirs, executors, administrators or assigns, any deed, deeds, papers, and instruments necessary or proper to vest in him or them, and complete the title to any of said estate and property.

In witness whereof, I hereunto set my hand and seal on this fifth day of December, in the year eighteen hundred and eighty-four.

(Signed) CHARLES F. JONES. [SEAL]

COMMONWEALTH OF MASSACHUSETTS,

MIDDLESEX, ss.

On this fifth day of December, A. D. 1884, personally appeared Charles F. Jones, who is personally known to me to be the grantor named in and the subscriber of the foregoing deed, and acknowledged the same to be his free act and deed.

Witness my hand and official seal the day and year above written.

[SEAL] S. K. HAMILTON,
Notary Public.

EXHIBIT C., W. M. S.

WHEREAS, Frederick A. Pike, of Calais, Me., is in possession of two certain instruments of promissory notes made or signed by W. C. N. Swift, of New Bedford, Mass., dated April 20, 1883, and payable to one Charles F. Jones, one for the sum of $15,000, payable in two years from its date, the other for the sum of $20,334.60, payable in three years from its date, and

Charles A. Gregory, of Chicago, claims to be the real owner of said notes, and has brought a suit or bill in equity against the said Pike to obtain the possession of the said notes or instruments, which said suit is now pending before the Circuit Court of the United States, for the District of Massachusetts, and the said suit has been set down for hearing in said Court, and a record thereof made up and printed for such hearing, and the parties to said cause have agreed to submit the same to the determination of Ebenezer R. Hoar, of Concord, Mass., as arbitrator or referee, with the same power of passing upon and determining all questions raised and presented in said suit as if he were presiding as a judge in said Court on the hearing of said cause upon the evidence contained in the said record, the said referee to be governed by the rules of law applicable to said cause, as he would be if sitting as a judge in said Court.

Now, therefore, know all men by these presents: That the said Pike and Gregory do hereby submit the questions raised or presented by said suit in equity, and all of them, to the determination of the said E. R. Hoar, the award of decision of whom in the premises shall be final. And if either of said parties shall neglect to appear before said referee, after due and reasonable notice of the time and place appointed for the hearing of said matter, the referee may proceed in his absence. And it is further agreed that the said two notes, the rightful possession of which is in controversy, shall be forthwith delivered to said referee by said Pike, and be left in his possession to await and abide the award of said referee to be made in the premises; and that said notes shall be by said referee passed over to whichever of said two parties shall, in his judgment, be entitled thereto. And it is further agreed that the charges of said referee for his services in this matter shall be paid equally by each party, that is, divided between them.

And the said Pike and Gregory agree that they will respectively observe, keep and perform the award of the said referee of and concerning the premises in all respects.

It is furthered agreed, that this submission is based upon a good and valuable consideration as between the parties thereto, and that the same shall be binding upon their assigns and legal representatives, respectively, in the case of the death of either of said parties,

before the making and publication of any award under this submission.

It is further agreed, that if the said E. R. Hoar, herein selected as referee, shall be unable or unwilling to act as such referee, he shall have the power of appointing some one to act in his place; and that the person so named by him to act as referee shall have all the powers hereby or herein conferred upon him, the said Hoar.

Dated this the thirtieth day of November, A. D. 1886.

FREDERICK A. PIKE,
By THOMAS H. TALBOT.

CHARLES A. GREGORY,
By F. A. BROOKS.

EXHIBIT D, W. M. S.

UNITED STATES CIRCUIT COURT,

FOR THE DISTRICT OF MASSACHUSETTS.

IN EQUITY.

GREGORY *v.* PIKE ET AL.

DECEMBER RULES, VIZ., DEC. 6, 1886.

And now comes the complainant in the above-entitled cause at the December Rule day aforesaid, the Court not being in session, and enters in the Clerk's Office of said Court an order that the bill of complaint in said cause be dismissed. And the complainant will apply to the Court for a confirmation of this order, as soon as an opportunity shall be presented for doing so.

By his solicitor,

F. A. BROOKS.

[ON BACK OF THIS PAPER IS INDORSED AS FOLLOWS:]

2,170 Eq.

GREGORY *v.* PIKE ET AL.

Order that bill of complaint be dismissed.

EXHIBIT E, W. M. S.

Whereas, Charles A. Gregory is the plaintiff in a suit in equity now pending in the United States Circuit Court for the District of Massachusetts, in which suit Frederic A. Pike, of Calais, Maine, is principal defendant, to recover possession of two non-negotiable notes signed by W. C. N. Swift of New Bedford, and said Swift was also made a party defendant in said suit, and it is not deemed necessary by said Gregory and Pike that said Swift should be continued a party to said suit, —

Now it is agreed by said Pike that, if said Gregory will discontinue said suit against said Swift, that he, the said Pike, will not deal with either J. C. Kemp, George W. Butterfield or Charles F. Jones with said Swift in any way in reference to said notes, except in pursuance of the rights of said Gregory therein as they may be determined therein in said pending suit.

And whereas the note of $20,334.60, signed by said Swift, and embraced in said bill in equity, will mature in April next, said note now being in the hands of said Pike, it is agreed that said $20,334.60 note shall at once be lodged for safe keeping in the hands of Amos P. Tapley, to abide the determination or result of said suit in equity, and that as soon as it shall mature a suit at law shall be brought on said note, by or under the joint control or direction of Thomas H. Talbot and F. A. Brooks, the said Talbot as attorney for said Pike, and the said Brooks as attorney for said Gregory, to be paid by their respective clients.

F. A. PIKE.

Boston, Jan. 8, 1886.

EXHIBIT F, W. M. S.

AWARD.

The undersigned, referee in the matter submitted to him by Charles A. Gregory and Frederic A. Pike, under the submission, a copy of which is hereto annexed, having duly heard the parties, awards and determines thereon, and this is my final award in the premises as follows, to wit: —

That the said Pike is not entitled to detain or withhold from said

Gregory the two Swift notes mentioned or described in the submission, except for the purpose of securing the payment of another certain note, signed by G. W. Butterfield and Charles F. Jones, for the sum of $2,437.50, dated July 26, 1883, and payable to C. H. Eaton, of Calais, Me., or order, a copy of which is hereto annexed; that upon or after the said Eaton note, or whatever sum is now due thereon with interest, as stipulated in said note, shall have been paid by the said Gregory, the said Gregory will be entitled to the possession of the two Swift notes, one of $15,000, and one of $20,334.60.

He also finds and determines that upon the payment of said Eaton note by said Gregory, he will be entitled to a transfer or delivery to himself of said Eaton note, and to the benefit of any sums which may be recovered of the said Butterfield and Jones on said note.

Dated at Boston the thirtieth day of November, in the year one thousand eight hundred and eighty-six.

E. R. HOAR.

[Copy]

Bangor (Me.), July 26, 1883.

On or before Jan. 1, 1884, we promise to pay to C. H. Eaton, or order, two thousand four hundred and thirty-seven dollars and fifty cents, — with interest at the rate of one per cent per month from date. Value received.

G. W. BUTTERFIELD.
CHARLES F. JONES.

EXHIBIT G, W. M. S.

[Copy]

Boston, Dec. 24, 1886.

Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, Executrix of Frederic A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883, one for $15,000, on two years time, and one for $20,334.60, three

years time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct.

JOHN G. STETSON.

[P. S. Please return this receipt when any direction is given as to these notes, that the direction may be indorsed thereon.

J. G. S.]

EXHIBIT H, W. M. S.

[COPY]

COMMONWEALTH OF MASSACHUSETTS,

[L. S.] SUFFOLK, ss.

To MARY H. PIKE, *of Calais, in the State of Maine*, GREETING:

We command you that you appear before our Supreme Judicial Court, at the Rules to be holden at Boston, within our said County of Suffolk, on the first Monday of April next, then and there to answer to a Bill of Complaint exhibited against you in our said Court, by Charles A. Gregory, of Chicago, in the State of Illinois, and to do and receive what our said Court shall then and there consider, in that behalf.

Hereof fail not, under the pains and penalties, in the law, in that behalf provided.

Witness, Marcus Morton, Esquire, at Boston, the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

HENRY A. CLAPP,
Asst. Clerk.

EXHIBIT I. W. M. S.

[COPY]

Agreement made Jan. 23, A. D. 1884, *by and between* FREDERIC A. PIKE, *of Calais, Me., of the first part, and* CHARLES A. GREGORY, *of Chicago, Ill., of the second part,* WITNESSETH: —

That the said Pike, for and in consideration of one dollar in hand paid to him by said Gregory, agrees to sell and convey to said Gregory all of said Pike's interest in and to five hundred and thirty-two nine-hundredths of the May Lundy Mine, so called, situated in the Homer Mining District, in Mono County, California, and his interest in the whole of the Lake View and Lucky Morton Mines, in said District, for the sum of $173,333, payable to James R. DeWolf, of Liverpool, England, for him on or before the first day of July, A. D. 1884. And the said Pike agrees, any time between now and the first of July next, when thereto requested by the said Gregory, he will lodge deeds of said interest in said three mines with said DeWolf, to be delivered to said Gregory by said DeWolf on the payment to him by said Gregory of said sum of $173,333, provided said sum is paid to said DeWolf on or before the said first day of July next, and if not so paid on or before the said first day of July next, then on the second day of July next the said DeWolf is to return said deeds to said Pike, and this agreement is at an end, it being specially declared that time is of the essence of this contract. It is further agreed that until said sum of $173,333 is fully paid by said Gregory to said DeWolf for said Pike no ownership or control of said mine shall vest in said Gregory, but it shall remain as if this agreement was never made. Should said Gregory make all of said payments, and thus entitle himself to the deeds herein specified, then he shall take immediate possession of said interest in said mines, and if at that time there are any outstanding contracts for hauling ore from the mines to the mill said Gregory shall assume the same, and if there be any ore at the mill said Gregory shall, upon taking possession of said property, pay for said ore at the cost thereof. And it is further agreed that Charles N. Fox and M. B. Kellogg, of

San Francisco, owners of 209-900ths of the May Lundy Mine, may become parties to this agreement by signing the same within thirty days from this date, and in case they do so sign, they come into the same on the same terms as the said Pike; if they do not become parties to this agreement on or before the twenty-third day of February, A. D. 1884, then this agreement is void. If they become parties to the agreement, and lodge their deeds with said DeWolf, then both transactions with them and with said Pike are to be considered as one, in this that the said Gregory shall not pay Fox & Kellogg, unless he pays Pike, nor pay said Pike unless he pays Fox & Kellogg, but shall pay both parties at the same time or neither. The sum to be paid said Fox & Kellogg for their interest in said May Lundy Mine is $43,541. All the above payments are to be made to said DeWolf for said Pike and said Fox & Kellogg. With the said mining interests are to be included in the same deeds all the interests of said Pike and said Fox & Kellogg in the Water Power at Lundy, and the mill and store and toll-road and tramway, and the buildings erected on and near said mines, and the tailings; and the said Fox & Kellogg are not to sell and dispose of any of the personal property used in the working of said mine, except in the usual course of business, but all of it on hand at the time possession may be taken of the property under and by virtue of this agreement, and the deeds lodged in accordance therewith, shall become the property of said Gregory. And whereas the said Pike has advanced certain sums of money in the development of the May Lundy Mine, for a part of which some of the other owners of the said May Lundy Mine are liable personally, or the shares of said owners of said May Lundy Mine are liable to said Pike in accordance with law, now, if, at the time the said Gregory shall take possession of the said property according to the terms of the agreement and the deeds given in accordance therewith, said Pike shall not be fully paid for his claimso n account of said advances, then he is to assign his said claims to said Gregory, and said Gregory is to pay him for the same either in cash or satisfactory paper before taking possession of said property. But this agreement relative to said advances shall not affect the duty of said DeWolf to deliver the said deeds to said Gregory, provided the payments are made in accordance with this

agreement. Said claim for said advances exists solely against the 159-900 of the May Lundy Mines called the Butterfield interest, and shall not exceed $7,000, and shall be legally enforceable against said interests.

CHARLES A. GREGORY.
F. A. PIKE.

PAPERS FILED IN EQUITY SUIT, NO. 2,170.

EXHIBIT 3.

RELEASE AND DISCLAIMER.

[FILED JAN. 2, 1886.]

And now comes the plaintiff and releases and discharges W. C. N. Swift, one of the defendants, from all claim or liability whatever under the bill of complaint in this suit arising from or by reason of the said Swift's note of fifteen thousand dollars, drawn payable to Charles F. Jones, mentioned and referred to in the bill of complaint in this suit, and says that he will not, under said bill of complaint, seek or ask for any order or decree in said suit against the said Swift in relation to said fifteen thousand dollar note, the object of this release and disclaimer being to satisfy the said Swift and this honorable Court that the said Swift has no pecuniary interest or motive to contest the claim of the plaintiff in this case so far as relates to the said note of fifteen thousand dollars, and consequently that the said Swift has no right to offer evidence in regard to said fifteen thousand dollar note in the absence of any claim made by the plaintiff against him on or under the same; and the plaintiff says that he gave a similar release to the said Swift on the twenty-sixth day of October last, by an instrument delivered to his solicitor in this cause.

CHARLES A. GREGORY,
By his Solicitor,
F. A. BROOKS.

EXHIBIT 4.

MOTION TO DISMISS BILL AS AGAINST DEFENDANT SWIFT.

[Filed Jan. 9, 1886.]

And now comes the complainant Gregory and moves the Court that his bill in said cause be dismissed as to the said Swift, one of the defendants therein named; and for ground of such motion the complainant shows that the said Swift is not a necessary party to said bill of complaint, and that no relief is therein sought as against the said Swift, or desired by said complaint, and that said complainant has notified said Swift or his solicitor that no relief is sought against him, and that he, the complainant, is willing to discontinue the suit as against him, said Swift, and to pay his taxable costs up to this time, if said Swift would consent to such dismissal, and an entry thereof to be made on the docket of the court; but said complainant is given to understand by said Swift's solicitor, that he, Swift, will not consent that said bill be dismissed as against him, as aforesaid. And the complainant says that the said Swift has procured certain evidence to be taken in said suit in his behalf as claimed by him, and is seeking to have a certain deposition of J. C. Kemp Van Eé received as evidence in his behalf, and is seeking thereby to encumber the record with matter wholly immaterial to any issues of fact existing in said suit; and the plaintiff moves that upon the dismissal of said bill as to said Swift, that the depositions of said Swift himself, and of W. H. Aiken, taken heretofore in said cause on the part of said Swift, be withdrawn or expunged or stricken out.

By his Solicitor,

F. A. BROOKS.

EXHIBIT 5.

STIPULATION.

[Filed Sept. 25, 1886.]

It is agreed that the title deeds to the mining property, made by the defendant Pike and placed in escrow in the hands of the Union Trust Company of New York, to be passed over on payment of the

price thereof as set forth in the contract of July 31, 1883, marked "Exhibit A," were received back from said Trust Company by said Pike pursuant to the terms of said agreement, and never went into the hands of said Butterfield or of the grantees therein named; these deeds were taken from said Trust Company by said Pike, probably in the month of January, 1884, after he, Pike, had seen the plaintiff Gregory and had been informed or assured by him that the purchase money would not be paid in accordance with the contract.

F. A. BROOKS,
Solicitor for Plaintiff.
T. H. TALBOT,
Solicitor for Defendant PIKE.

EXHIBIT 6.

RECORD IN No. 2,486 LAW, GREGORY *v.* JONES.

UNITED STATES OF AMERICA.

MASSUCHUSETTS DISTRICT, ss.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Monday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, the fifteenth day of said May happening on a Sunday,

Before

THE HONORABLE LEBARON B. COLT,
Circuit Judge.

CHARLES A. GREGORY, of Chicago, in the State of Illinois, *Plaintiff*,

v.

CHARLES F. JONES, of San Francisco, in the State of California, commorant of Newton, in the County of Middlesex and Commonwealth of Massachusetts, *Defendant*.

IN AN ACTION OF TORT.

The writ in this cause is dated the twenty-eighth day of November, A. D. 1884, and was made returnable before the Justices of the Superior Court of the Commonwealth of Massachusetts, then next to be

holden at Lowell, within and for the County of Middlesex, on the second Monday of March, A. D. 1885. This cause was thence removed to this Circuit Court upon the petition of the defendant filed and allowed in said Superior Court, and was entered here at the May Term of this Court, A. D. 1885, when and where the parties appeared by their respective attorneys.

Upon the entry of said cause in this Court certified copies were filed of the following papers and processes on file and of record in said Superior Court, namely: 1, Writ; 2, Declaration; 3, Affidavit for Arrest; 4, Order for Arrest; 5, Return of Sheriff; 6, Certificate of Master in Chancery; 7, Appearance; 8, Defendant's Answer; 9, Petition for removal; 10, Bond on Removal; which said copies are in the words and figures following: —

[MEMORANDUM. Papers 1, 2, 8 and 9 only are printed, the printing of papers 3, 4, 5, 6, 7 and 10 being omitted by direction of counsel for both parties.

JOHN G. STETSON, *Clerk*.]

(1) WRIT.

COMMONWEALTH OF MASSACHUSETTS,

[L. S.] MIDDLESEX, ss.

To the Sheriffs of our several Counties or their Deputies, GREETING:

We command you to attach the goods and estate of Charles F. Jones, of San Francisco, in the State of California, commorant of Newton, in said County, to the value of fifty-five thousand dollars, and for want thereof to take the body of the said defendant (if he may be found in your precinct) and him safely keep, so that you have him before our Justices of our Superior Court, next to be holden at Lowell within and for said County of Middlesex, on the second Monday of March, A. D. 1885, then and there in our said Court to answer unto Charles A. Gregory, of Chicago, in the State of Illinois, in an action of tort.

(7) DECLARATION.

First Count. And the plaintiff says the defendant has converted to his own use a certain promissory note, made and signed by one W. C. N. Swift, for $20,334.60, dated April 4, A. D. 1883, payable to the order of one George W. Butterfield in two years from said date, with interest at the rate of six per cent. per annum, and by said Butterfield indorsed in blank, said note being the property of the plaintiff.

Second Count. And the plaintiff says the defendant has converted to his own use a certain other promissory note, made and signed by said Swift, for $20,334.60, dated April 4, A. D. 1883, payable to the order of said Butterfield in three years from said date, with interest at the rate of six per cent. per annum, and by said Butterfield indorsed in blank, said note being the property of the plaintiff.

To the damage of the said Gregory (as he saith) the sum of fifty-five thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ, with your doings therein.

Witness, Lincoln F. Brigham, Esq., at Cambridge, the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and eighty-four.

THEO. C. HURD,
Clerk.

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(8) DEFENDANT'S ANSWER.

COMMONWEALTH OF MASSACHUSETTS,
MIDDLESEX, ss.

And now comes the defendant, and for answer denies each and every allegation in the plaintiff's writ and declaration contained.

By his Attorney,

EDWARD P. BROWN.

J. M. M.

MIDDLESEX, ss. Filed April 8, 1885.

(3) PETITION FOR REMOVAL.

COMMONWEALTH OF MASSACHUSETTS,
MIDDLESEX COUNTY.

To the Honorable the Justices of the Superior Court, Middlesex County, Commonwealth of Massachusetts.

Your petitioner, Charles F. Jones of San Francisco, in the State of California, respectfully shows that he is the defendant in the foregoing entitled suit, and that the same was commenced against him on or about the twenty-eighth day of November, 1884, in said Superior Court; that your petitioner was, at the time of bringing said suit, and still is, a citizen of the State of California and resident thereof.

Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the said plaintiff, Charles A. Gregory of Chicago, in the county of Cook, in the State of Illinois, a citizen of said State of Illinois, and that the matter in dispute in this suit exceeds the sum of five hundred dollars exclusive of costs. Your petitioner further represents that this suit has not and could not have been tried, but is now pending for trial in this Court, and that your petitioner desires to remove the same into the Circuit Court of the United States for the District of Massachusetts, in pursuance of the Acts of Congress in that behalf provided.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States, in and for the District of Massachusetts, and he will ever pray.

CHARLES F. JONES,
By E. P. BROWN, *Attorney for Petitioner.*

MIDDLESEX, ss. Filed April 15, 1885.

This cause, entered at the May term, A. D. 1885, as aforesaid, was thence continued from term to term to this present May term, when the defendant, although solemnly called to come into court, does not appear but makes default.

It is thereupon considered by the Court, to wit, June 28, 1887, that the said Charles A. Gregory, plaintiff, recover of the said Charles F. Jones, defendant, the sum of $9,356.88 damages, and his costs of suit taxed at

A true Record:

Attest: JOHN G. STETSON, *Clerk.*

UNITED STATES OF AMERICA,

MASSACHUSETTS DISTRICT, ss.

I, Alexander H. Trowbridge, Deputy Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record of said Circuit Court in the cause entitled, 2486 Law Docket,

CHARLES A. GREGORY, *Plaintiff*, *v.* CHARLES F. JONES, *Defendant*,

determined in said Circuit Court.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court at Boston in said District, this twelfth day of January in the year of our Lord one thousand eight hundred and eighty-eight and of the Independence of the United States the one hundred and twelfth.

[SEAL] ALEX H. TROWBRIDGE,
Deputy Clerk.

EVIDENCE FOR DEFENDANT, MARY H. PIKE, UNDER STIPULATION.

EXHIBIT 7.

DEPOSITION OF CHARLES A. GREGORY.

Cross Examination by THOMAS H. TALBOT Esq., *of Counsel for Defendant Frederic A. Pike.*

Cross-Int. 15. In your answer to Int. 4 you have stated yourself as leaving New York for England April 9, 1883, and remaining in England till into January, 1884. Please state what was your business in England during all that time.

Ans. I went to England for the purpose of assisting Mr. Butterfield and Mr. Jones to make a sale of some mining properties situated in Mono County, California. One of the mines was the May Lundy; another, the Lake View; and the third the Lucky Morton, and a number of other mines contiguous thereto.

Cross-Int. 16. Were you endeavoring to sell these mines until you left England, in January, 1884?

Ans. Buttterfield and Jones were endeavoring to sell them there, and I was giving them such assistance in so doing as I was called upon by them to give.

Cross-Int. 17. Have you not stated this in another form elsewhere? Have you not alleged that you were endeavoring to sell those mines all the while you were in England?

[*Objected to for substance, and also because it is not competent to make the inquiry unless the contradictory statements suggested are distinctly pointed out to the witness in the question.*]

Ans. I do not know what the particular allegations referred to are.

Cross-Int. 18. Were you not endeavoring to sell the mines you have named, during all your stay in England? If so, please state when you ceased such endeavors or changed your action in that respect.

[*Objected to as not relating to matters of the examination in chief.*]

Ans. I was ready and willing, at all times while I was in England, to assist Jones and Butterfield in selling said mines under their direction, and I did render such assistance as they called upon me to render from time to time.

Cross-Int. 19. When did you first acquire an interest in the mining properties which you have mentioned, such an interest as induced you to assist towards their sale, as you have stated?

[*Same objection as last stated.*]

Ans. About the first of May, 1883.

Cross-Int. 20. When did you first become acquainted with Charles F. Jones, mentioned in your direct examination?

Ans. About the last of February or first of March, 1883, I can't state exactly.

Cross-Int. 21. When did you first commence negotiations towards acquiring an interest in the mining properties you have mentioned, such an interest as already referred to?

[*Same objection.*]

Ans. In March, 1883, — early in March or the last of February, — I was requested by Butterfield and Jones to assist them in disposing of said property.

Cross-Int. 22 At whose suggestion was the sale of stock, mentioned by you, made to Mr. Swift, and for what purpose was it suggested and made?

Ans. Mr. Butterfield and Mr. Jones suggested that, if I should sell that stock to Mr. Swift, it would enable me to obtain means to assist them in carrying out their enterprise to sell said mines. My object was to convert my stock into money, or interest-bearing securities. I consented to a sale for that purpose, to convert my stock into money or interest-bearing securities. I had in contemplation to assist these gentlemen in their enterprise.

Cross-Int. 23. As you were then informed, was not the right of Butterfield and Jones in said mining properties liable to expire July 30, 1883?

[*Same objection.*]

Ans. I understood that they had purchased a mining property and agreed to pay for it on or before the thirtieth day of July, 1883.

Cross-Int. 24. You have stated that Butterfield left England

about July 14 or 16, 1883, to return to America. What knowledge had you, at that time, of his object in coming here? What was his object as thus made known to you?

Ans. I had conversation with him just prior to his leaving, in which he stated his object. He stated to me that he was unable to pay Mr. Pike, according to his agreement, for the mines, and that he wanted to get back to America before the 30th of July, 1883, and save his rights from forfeiture under the contract with Mr. Pike; and he asked me in that connection, if I would allow him to make use of the Swift notes or either of them, referring to the original Swift notes, in making some arrangement with Mr. Pike to save his agreement from forfeiture, which I absolutely refused.

Cross-Int. 25. After Butterfield arrived in America, was there any correspondence by cable between you and him in relation to his negotiation with Pike, and to his use of the Swift notes in that negotiation? Did you or not ask him if Pike had been satisfied?

Ans. There was correspondence between Butterfield and me after he arrived in America. It was solely by cable, was wholly at Mr. Butterfield's instance and commencement, and was wholly as follows: —

Aug. 4, 1883, I received a cablegram from Boston purporting to come from Butterfield, which I now produce and read, and ask to have marked for identification. It reads: —

"GREGORY, Gillig, Ldn.

Shall I use note, satisfy Pike and Silver-Group judgments? If so, Butterfield, Kemp. Pump Jones, Europe. Answer quick.
(Signed) BUTTERFIELD, KEMP."

My reply was this: —

"Is bond satisfied? Don't understand message after Kemp. My interest to be one third, delivered presently if use notes. Answer."

To save expense, my cablegram was not signed. That is directed to "Butterfield, Kemp, Quincy House, Boston."

Aug. 6, 1883, I received the following reply: —

"Must adhere original contract. If satisfied debentures delivered, my arrival London. Butterfield, Kemp, 90 Lundy.
(Signed) JONES."

This was received from Boston, addressed to me.

Aug. 7, 1883, I replied; addressed to Butterfield, Kemp, Quincy House, Boston: —

"Prefer not use note. I forbid use note except increase interest."

This cablegram was not signed by me, but was received. This was all the correspondence.

Cross-Int. 26. Did you cause any demand for either of the Swift notes to be made on Butterfield after he reached this country? If so, by whom was it made, with what result, and when was this result made known to you?

Ans. I did cause demand to be made upon Butterfield for the three years' Swift note, immediately on his reaching Boston in July. It was made by Frederic W. Gregory on Butterfield in Boston, before Butterfield went to see Pike. He didn't get the note, but it was reported to me by Frederic that Butterfield said the note was in his trunk, and he would attend to it after he came back from Maine. He was then going immediately to Maine to see Pike. This result was made known to me by Frederic by letter received in London, and afterwards on my return, by conversation. I don't remember when I received the letter.

Cross-Int. 27. Did you know whether or not Jones went with Butterfield to see Pike? If so, when did you know that, and what was the fact as made known to you?

Ans. I learned afterwards in London, that Jones and Butterfield were together in Calais, Me., and saw Pike. The precise time I learned this I cannot state; it was after Jones came to London, which was about Sept. 1, 1883.

Cross-Int. 28. Did you then learn whether or not the contract had with Pike, which expired July 30, 1883, had been extended?

[*Objected to as not relating to the matter of the examination in chief.*]

Ans. I never knew until December, 1883, as before stated in this deposition, what had been done in that connection.

Cross-Int. 29. Did you not learn till December, 1883, that the contract with Pike had been extended?

Ans. I repeat that I never knew what contract had been made

with Pike till December, 1883, after the expiration of the contract which expired the 30th of July, 1883. I understood, however, without knowing what new contract had been made, without seeing it, that Jones and Butterfield had a right to sell said mines, such right extending to Jan. 1, 1884, and that the price they were to pay for them had been increased by Pike, one hundred thousand dollars; that the payment was to be made before Jan. 1, 1884, and was a hundred thousand dollars larger than the price which was named in the contract which expired July 30, 1883.

Cross-Int. 30. When did you learn this which you have stated in your last answer?

Ans. I learned from Mr. Jones soon after his arrival in London, that he and Mr. Butterfield had made some arrangement with Mr. Pike. I only learned from Jones in a general way, that they had made such arrangement as I have spoken of.

Cross-Int. 31. Did or not Jones tell you immediately after his reaching London, that a note, meaning one of the Swift notes, had been put up with Pike?

Ans. It did come out from Jones that one of the Swift notes belonging to me had been used with Pike in procuring an agreement with Pike after the expiration of the contract expiring July 30, 1883; I could not ascertain, and did not know how it had been used, or upon what terms, but Jones told me that it was so used that they could get it back from Pike at any time, and this matter was a subject of angry altercation between Jones and me.

Cross-Int. 32. Did you not know of the change of the Swift notes as early as July 16, 1883?

Ans. I never knew anything about it until December, 1883.

Cross-Int. 33. Did you or not assent to the sending of the original Swift notes to Boston, just before you left New York for England, in order that money might be raised upon them?

Ans. I was consenting that they should go over to Boston. There was a certain instruction in writing with reference to the notes, which writing I have not with me, and cannot testify to its contents.

Cross-Int. 34. Did you not consent that in Boston those notes

should be placed in the hands of Charles F. Jones, before mentioned?

Ans. The facts in relation to that inquiry are as follows:—

On the 9th of April, 1883, in New York, I gave the notes to Mr. Butterfield in an envelope, after receiving his receipt for them, as before spoken of. He was about to go to London on the same steamer with me. He said he had requested Mr. Williams of Boston to come on there to New York, and take these notes back to Boston, with other papers that he had, and give the same to Charles F. Jones. Charles F. Jones was to remain in America while we were in London. I saw them delivered to Mr. Williams, I mean Frank H. Williams.

Cross-Int. 35. Did you say nothing about any use which was to be made of those notes? If you said anything, please state what.

Ans. What I stated is the same as is in a memorandum that was with the notes. Precisely what that is I do not remember. It was in the envelope with the notes.

Cross-Int. 36. Were not those notes so delivered and sent to Boston, in part, at least in furtherance of your contemplation, as before stated by you, to aid Butterfield and Jones in their enterprise?

Ans. They were to be held by Butterfield as I have described in the written receipt he gave me, and whatever the written memorandum that I have spoken of further directs. The reason the notes were given to Mr. Butterfield was that I had no money to contribute towards the enterprise, and, as my share in any profits under a contract then in contemplation depended upon my paying $10,000 in money, I handed these notes over to Butterfield as a security that I would thereafter, some time, pay $10,000.

Cross-Int. 37. Was nothing said by you, at the time of so handing these notes, about money being raised upon them presently, through the aid of one of your brothers?

Ans. Yes, there was something said, — that one of those notes should be taken to Franklin E. Gregory, to see if he would get some money upon the note; and my recollection is, that the way the money was to be used was specified in that memorandum.

CHARLES A. GREGORY.

Attest: JOHN G. STETSON, *U. S. Commissioner.*

EXHIBIT 8.

BOSTON, Oct. 16, 1885.

Present: FRANCIS A. BROOKS, Esq., *of Counsel for Complainant;*
THOMAS H. TALBOT, Esq., *of Counsel for Defendant, Pike;*
FREDERIC A. PIKE, *Defendant.*

DEPOSITION OF FREDERIC A. PIKE.

Direct Examination by THOMAS H. TALBOT, Esq., *of Counsel for Defendant, Frederic A. Pike.*

Int. 1. Please state your name, age, residence, and occupation, and how long you have resided there.

Ans. Frederic A. Pike; sixty-seven; Calais, Me.; lawyer; I have resided in Calais always. I am defendant in this suit.

Int. 2. Please state your connection with the two notes which are the subject of this controversy, and with the transactions in which they came to your hands.

Ans. In January, 1883, I sold some mining property to George W. Butterfield. We were here in Boston at the time. A cash payment was made to me, and the remainder of the purchase money was to be paid in Boston on the 30th of July, the same year.

In July, Butterfield telegraphed me from Boston, to come to Boston and meet him and arrange this sale. I came up, and after some negotiations, implying a continuance of the contract for thirty or sixty days, which came to nothing, we started and went to Calais, where the owners of the mine reside, I being but part owner of the mine, although it is in my name. Charles F. Jones, a partner of Mr. Butterfield in the mining operation, went with us to Calais. We then had a meeting of the owpers, and discussed the whole matter in their presence, and finally concluded a contract with Mr. Butterfield on the 31st day of July, which contract is set out in the plaintiff's bill. To make the cash payment called for in the contract, Mr. Butterfield or Mr. Jones gave me these two notes in controversy to use according to the terms specified in the contract. Both Mr. Butterfield and Mr. Jones were present, and my impression is

that Jones gave me the notes, but I am not quite willing to swear whether it was Jones or Butterfield who actually handed me the notes. As the notes were payable to Jones and indorsed by him, and were not negotiable, I inquired of him with great particularity as to Mr. Swift, the maker of the note, and whether he had any possible defence to the payment of them, either legal or equitable, or in any way; and was assured that Mr. Swift gave the notes for a valuable consideration, and would be quite willing to pay them when they became due. I had no idea of any other ownership than that of Mr. Butterfield or Jones, and had no suspicion of any other ownership; particularly, I hadn't the remotest idea that Mr. Gregory was directly or indirectly interested in the notes, that is, Mr. Gregory, the plaintiff in this case. I went on and fulfilled my part of the contract by depositing my deeds, the three deeds of the three mines,— that is, the whole of the two mines and my interest in the third,— in the Union Trust Company, of New York, and was obliged to pay them two hundred and eighty-two dollars and fifty cents for taking the deeds in escrow.

The first I knew the plaintiff had any claim or demand for these notes was in December, 1883, when his brother presented me an order from Butterfield for the notes, which I declined giving to him.

At the time of this negotiation of July 31, Mr. Butterfield found it necessary to free the Mary Lundy mine of a mortgage there was on it to Charles H. Eaton, and so they went through a negotiation in my presence. That negotiation ripened into an agreement which is set out in my answer, and is as follows.

I give the note and order.

This is the note: —

"Bangor, Me., July 26, 1883.

On or before Jan. 1, 1884, we promise to pay C. H. Eaton, or order, two thousand four hundred and twenty-seven dollars and fifty cents, with interest at the rate of one per cent. a month from date, value received.

G. W. BUTTERFIELD.
CHARLES F. JONES."

This is the order: —

"F. A. PIKE, Esq., — You will please hold the Swift notes this day given by me as collateral for the payment of the above note, as well as for the payment of the twenty-five thousand dollars pledged to you.

CHARLES F. JONES.

July 31, 1883."

This order was accepted by me, payable after receiving the twenty-five thousand dollars according to the contract, this acceptance being written across the face of the order.

In consideration of receiving this note and acceptance, Eaton at that time discharged his mortgage on the May Lundy mine given to him by Butterfield.

This mining property has never since been sold. There has been a negotiation for a sale for a hundred thousand dollars less than the amount specified in this contract of July 31, 1883, and that negotiation is still pending. I never have had any negotiation for a larger amount than two hundred and fifty thousand dollars since that of July 31, 1883.

I didn't know at the time of this contract with Butterfield what Butterfield's ability was about paying the twenty-five thousand dollars. Nothing was said to me about taking the notes till after the contract was all completed.

Cross Examination by FRANCIS A. BROOKS, Esq., *of Counsel for Complainant.*

Cross-Int. 3. Was not the contract referred to by you as made with Butterfield in January, 1883, in writing?

Ans. It was, and it was for the same property specified in the contract of July 31, 1883.

Cross-Int. 4. Was not the price payable for this property under the contract of January, 1883, much less than that specified in the contract of July 31, 1883?

Ans. It was. One hundred thousand dollars less nominally, but really it was between seventy-five thousand and a hundred thousand dollars less.

Cross-Int. 5. Did not the contract of January, 1883, or the right

of Butterfield to purchase this mining property of you, expire by its own terms or limitation on the thirteenth day of July, 1883?

Ans. It did.

Cross-Int. 6. Did it not so expire by reason of the failure or inability of Butterfield to make the payment required by the contract?

Ans. It did.

Cross-Int. 7. Was it not known to you before July 30, 1883, that Butterfield would not be able to fulfil the terms of said contract of January, 1883?

Ans. I didn't expect he would; but he is a man of great resources, and I didn't know what might turn up.

Cross-Int. 8. Had you heard anything about those Swift notes from any one, prior to July 31, 1883?

Ans. I never had heard about any notes of Swift's, payable to Mr. Jones, prior to that time.

Cross-Int. 9. Had you, prior to that time, heard anything about notes of Swift payable to Butterfield?

Ans. I had.

Cross-Int. 10. From whom did you learn about such notes?

Ans. From Mr. Butterfield, in New York, on the day before he left for Europe, in April, 1883.

Cross-Int. 11. Did Butterfield then represent himself as the owner or holder of such notes?

Ans. He did, as the owner.

Cross-Int. 12. When and from whom did you first learn that the Swift notes, claimed by Butterfield, in New York, as belonging to him in April, 1883, had been changed into notes payable to Jones?

Ans. I can't say that I know it now, except what other people tell me; and my impression is, that Mr. Gregory was the first man to tell me, which must have been in January, 1884.

Cross-Int. 13. You have stated that you made searching inquiries in regard to these notes when you took them July 31, 1883. Did you not then ascertain that they were the same, or substitutes for those mentioned by Butterfield as belonging to him in 1883?

Ans. I did not.

Cross-Int. 14. Did you then suppose these notes to be for sums

due from Swift, in addition to the sums contained in the notes claimed by Butterfield in 1883?

Ans. I didn't connect the two transactions in my mind together at all. I took no memorandum whatever in New York of the Swift notes to Butterfield. I didn't recollect then, and do not recollect now, how many notes of Mr. Swift's Butterfield showed me in New York. I didn't know what they were given for, nor did I inquire of Jones in Calais what the notes given to him were for. The most that Butterfield told me was that they were given for a mining deal. That was in April, 1883, in New York. Butterfield was very jubilant over his success in getting the Swift notes. There was no reason why Butterfield showed me the Swift notes in New York, except that he wanted to boast of his success, and at the same time he showed me a good deal of money; there was no negotiation going on between us at the time.

Cross-Int. 15. Was any reason given you July 31, 1883, why these Swift notes were drawn payable to Jones without negotiability?

Ans. I asked Mr. Jones about that, and he said that Mr. Swift was an old gentleman of large wealth, and insisted upon giving them in that way; and as he didn't know that it made any difference to him in which way they were given, he took them in that form. It was because they were drawn in that way that I made the inquiries which I did about Mr. Swift's willingness to pay when they became due.

Cross-Int. 16. Did Jones represent to you at that time that the notes were given to him on a transaction between him and Swift, and that the notes belonged to him?

Ans. He didn't say what was the consideration for the notes; I didn't ask him. He was a man in whom I had confidence, and I took his statement to be true, and I found it to be true on writing to Mr. Swift. The only thing I wanted to know was whether Mr. Swift would have any objection to paying them when they became due.

[*Latter part of answer objected to as not responsive and not competent.*]

[*Adjourned.*]

OCT. 17, 1885.

Cross-Int. 17. Please look at the paper now shown you, a copy of which is set forth in the answer to Int. 13 of the plaintiff Gregory (Record, page 31), and state whether it is not one of the notes presented to you Dec. 15, 1884, by the brother of plaintiff, as stated by you in your examination.

Ans. I presume it is.

Cross-Int. 18. You notice that this order signed by Butterfield, dated London, Dec. 15, 1883, and referring to the $15,000 Swift note, recites that said note was the property of said Gregory at the time it was placed in your possession by him. In view of this statement by Butterfield himself, that you received this note from him, have you any doubt that you did not receive it from Jones?

Ans. That statement of Mr. Butterfield's doesn't aid my recollection at all. My impression is, I got the note from Jones; and you will notice that on the same day, in the Eaton case, Mr. Jones gives an order on me reciting that he placed the notes in my hands.

Cross-Int. 19. By whom was the contract of July 31, 1883, between you and Butterfield, framed or drawn?

Ans. It is in the handwriting partly of A. H. Sawyer and partly in my handwriting. Mr. Sawyer is a merchant, doing business for himself, and interested in the mining property.

Cross-Int. 20. By whom was the memorandum at the foot of this contract of July 31, 1883, relating to the Swift notes, framed or drawn?

Ans. That was made by me, and is in my handwriting.

Cross-Int. 21. I understood you to state, in direct examination, that the contract for the sale of the mining property to Butterfield was completed before anything was said respecting the Swift notes.

Ans. Yes, the contract was all completed; but, perhaps, not reduced to writing.

Cross-Int 22. It had then been agreed by Butterfield that he would pay $25,000 in money on the spot, had it not, on the execution, I mean, of the contract?

Ans. It had been agreed that he should pay me $25,000 on the execution of the contract.

Cross-Int. 23. And you had expected then, up to that time, to receive the money or its equivalent?

Ans. Yes.

Cross-Int. 24. Did you learn after this, and before the contract was executed, that he would not be able to pay you the $25,000?

Ans. Yes, before the contract was signed.

Cross-Int. 25. The contract had been framed so as to require the payment of this $25,000 in money at the time, with the knowledge and consent of Butterfield, had it not?

Ans. I had made one or two previous contracts, that is, I had made a draft of them, and Butterfield had examined them apart from me; and, if I recollect right, one of those contracts specified he was to pay partly in bonds, but just exactly what the terms of it were I cannot say, nor the amount to be paid. Butterfield had with him a programme or prospectus (or whatever it might be termed) of the sale of this property in London at very large figures, and in that, bonds were to be given; but when the thing was simmered down, and the contract was made and signed, I can't say that Butterfield saw the contract till he came to sign it.

Cross-Int. 26. You do not, then, know that Butterfield had consented to pay the $25,000 on the spot, at any time before the framing of the contract?

Ans. All I recollect about that is, that the $25,000 payment was agreed upon some time before anything was said about the Swift notes; I mean the payment of $25,000 in money, or its equivalent.

Cross-Int. 27. It appears from the memorandum at the foot of the contract drawn by you, that the Swift notes were lodged with you by Butterfield, and that both you and Butterfield signed the memorandum at the time. Under these circumstances, I am at a loss to understand why you now say that your impression is that these notes were placed in your hands by Jones. Will you please explain?

Ans. I have already said that Jones and Butterfield were both present at the time of the execution of the contract, and that there was discussion as to the Swift notes; and whether Jones handed them to me for the purpose of executing the stipulation in the Butterfield

contract for the payment of $25,000, or whether Butterfield himself gave them to me, with his own hand, I am in some doubt; but, after thinking the whole thing over, the impression on my mind is that Jones gave me the notes, with his own hand. Of course, if Jones gave me the notes, it was with Butterfield's knowledge and assent; and, if Butterfield gave them to me, it was with Jones's knowledge and assent.

Cross-Int. 28. And you now think that the statement contained in the memorandum, made at the time, and signed by you, that Butterfield lodged these notes in your hands, was not strictly correct, do you not?

Ans. I don't say that. It is a question of casuistry whether it be not strictly correct to say, if Jones furnished the notes to carry out the Butterfield contract by Butterfield's desire and assent, that Butterfield would be considered as having furnished the notes.

Cross-Int. 29. And you now suppose, as I understand you, that that is the sense in which you used the name of Butterfield instead of Jones in the memorandum reciting that Butterfield furnished the notes, instead of Jones?

Ans. Yes, that is my impression.

Cross-Int. 30. And you understood at the time that these notes really belonged to Jones, and not to Butterfield?

Ans. I can merely say I suppose so. The notes were payable to Jones, and I supposed so.

Cross-Int. 31. Who first suggested the idea of depositing these notes with you?

Ans. It was either Jones or Butterfield, I can't say which.

Cross-Int. 32. Whichever it was, did they inform you that they had no cash funds with which to pay the $25,000 stipulated in the contract?

Ans. That I don't recollect.

Cross-Int. 33. You are not, then, able to say whether you took these notes on deposit merely to oblige them, or because it was the only thing that you could get from them by way of security?

Ans. No; I can't say.

Cross-Int. 34. As a man of business dealing with mining men like Butterfield and Jones, did you consider it expedient to dispense

with the cash payment of the $25,000, or postpone that payment till the contract matured, if it was in your power to have got $25,000 in money?

Ans. This is the only mining property that I ever had any interest in. It was put upon me by Mr. Butterfield, who hunted me up as a purchaser in 1880; and in Boston, in January, 1883, he hunted me up to sell this property to him. He had an interest in the very property he wanted me to sell to him, which was one third of two of the mines and an eighteenth of the other. I had bought and paid for them, and agreed to let him have them at the cost price; and of this very purchase money, that he agreed to pay me in Boston in January and in Calais in July, 1883, he was to receive a proportion based on the ownership I have specified above. The price stipulated in the agreements of January, 1883, and of July, 1883, with Butter field was largely above the cost, and I gave them a memorandum that when he paid the amounts called for in those contracts, I would pay back to him a sum which would reimburse him, so that he would actually receive the one third of each of two of the mines and the one eighteenth of the other mine at the cost price and interest.

As to Jones, I was introduced to him in Boston by Butterfield, after I had executed the contract with Butterfield of January, 1883. This was the first I ever saw him. He was represented to me to be a man of large property, and I supposed he was, as he made the first payment to me. I made inquiries about him down in Maine, of parties with whom he had had transactions, who gave him a high character, and when this transaction occurred at Calais, I supposed him to be a man of property, and an entirely reliable man. The parties with whom I associated were men of means, and looked at this transaction as equivalent to a payment, and were inclined to oblige these purchasers, as they said it was a convenience to them to give them time to make the payment.

I had already told Mr. Butterfield, in Boston, that I would take no advantage of the forfeiture of the contract of January, 1883, and that I would give him any reasonable extension of it upon his making a small payment towards the purchase money; but when he wanted a recast of the contract as well as an extension of the time, I told him it was necessary to go East and consult the other owners.

The increase of price stipulated in Calais, and which, as I have already explained, Mr. Butterfield personally participated in, grew out of the negotiations for the new contract, and his statement of the immense sums he was sure to make in London out of this transaction. He made no serious objection to the increase of price.

Cross-Int. 55. From your last answer, I understand that you were willing and offered to extend the Butterfield contract of Jan. 29, 1883, without exacting any forfeiture, if a small payment were made towards the purchase money; that instead of accepting the liberal terms offered by you, Mr. Butterfield, or both Butterfield and Jones, preferred to let the old contract expire by its limitation on the 30th of July, 1883, and on the 31st of July, 1883, enter into a new contract with you for the same property, at a price from seventy-five thousand to a hundred thousand dollars higher than the price stipulated in the contract of January, 1883; and that they did in fact forego all advantage of this old contract, and did enter into their new contract of July 31, 1883, rather than pay the small amount required by you, and agreed to pay this larger sum as a condition of extending the old contract; and yet you found in this fact no evidence of their pecuniary inability to make a cash payment. Am I right?

Ans. I don't say that. That is not a fair inference from what I have said. In Boston, I offered Butterfield specifically to extend the contract sixty days if he would make a payment on the contract of $10,000, but the original contract of January did not include Fox and Kellogg, who are large owners in the mine. They had a permission to come in if they pleased, but the contract was valid if they didn't come in. In making the new arrangement in London, as I understood it, they had agreed to furnish the title to the whole mine, and that included Fox and Kellogg, and so they wanted a new contract which should include them. I told Butterfield, if he would go to Calais, my offer should remain good, notwithstanding the lapse of time; and that if he made a contract, well and good; if he didn't make a contract, he would have this privilege of extension of sixty days on payment of ten thousand dollars. Fox and Kellogg had been opposed to the sale of January, because the price had been too low. They live in San Francisco.

Cross-Int. 36. During these interviews between you and Butterfield and Jones in July, 1883, in regard to the extension of the contract of January, 1883, and during the negotiation for the contract of July 31, 1883, and all through that discussion respecting the deposit with you of the Swift notes, had you not in mind or memory the fact that Butterfield had in April, 1883, made a display of notes signed by W. C. N. Swift, with a view of impressing you as to his pecuniary resources; that is, did you not associate in any way the name of Mr. Swift, signed to the notes in suit, as the same Mr. Swift whose notes had been shown you by Butterfield in April, 1883, in New York?

Ans. I certainly had not forgotten the Swift notes shown me by Butterfield in New York, and thought it not at all impossible, if those notes were as good as he said they were, and he still held them, that by means of those notes, and pledging the mining property, he might raise the money in Boston and pay me off on the old contract, if we did not make a new one.

Cross-Int. 37. If on July 31, 1883, you had not forgotten the Swift notes shown you in New York by Butterfield in April previous, and supposed Butterfield might still have possession and control of the-e same notes, did you not infer, on the production of the Swift notes by either Butterfield or Jones at Calais, July 31, 1883, that they were in some way connected with the notes shown you by Butterfield in New York in April?

Ans. I haven't said that I supposed he still retained the notes. I had made no inquiries on the subject, and I have no recollection of connecting the two together in any way. Mr. Jones was a dealer in other mines besides these, and how he got the Swift notes I had no idea, and had no reason for making any supposition about it, and I made no inquiries about the consideration of the notes, or how he, Jones, got them.

Cross-Int. 38. Were you astonished or surprised when the orders for the delivery of these notes to Mr. Gregory, signed by George W. Butterfield, and setting forth that these notes were the property of Gregory at the time they were deposited with you, July 31, 1883, were presented to you in December, 1883, by Gregory's brother?

Ans. My feeling about that was, when they were presented, that the mining sale had failed in London, and that Gregory and Butterfield had combined to do me out of these notes.

Cross-Int. 39. The presentation of these orders for the notes signed by Butterfield did not operate on your mind to cast any suspicion upon the ownership of the notes by Jones, did it, at the time they were deposited with you?

Ans. I don't think it did.

Cross-Int. 40. In your answer to Cross Int. 16, you stated that you had confidence in Jones as a man of integrity, and believed whatever he told you about these notes. Do you still have the same confidence in him that you had in July, 1883, as a man of integrity?

Ans. I have no occasion to complain of Mr. Jones in any of my transactions with him.

Cross-Int. 41. Were you present during his examination in this room yesterday, as a witness in this case; and did you hear him testify that he considered those notes, when passed to him by Butterfield through Williams, as belonging to him, Jones; and that he believed he had a right to use them in any way he thought proper, or to that effect?

Ans. I heard his testimony, and heard something of the sort that is indicated in the question, in relation to notes sent to him from New York by Butterfield.

Cross-Int. 42. Did you not also hear Jones subsequently testify, or admit in his testimony on another occasion, when under examination on oath before S. K. Hamilton, master in chancery in the State, that these Swift notes do not, nor did they ever belong to me (meaning myself), nor did I (Jones) ever have any interest in them, or to that effect?

Ans. I heard whatever he testified, but I certainly wouldn't undertake to say specifically just exactly what it was.

Cross-Int. 43. Did not those two portions of testimony of Jones in this case yesterday seem to you inconsistent with each other, and inconsistent with the statement made by Jones to you in July, 1883, regarding these notes?

Ans The statement I have testified to that Jones made to me in July, 1883, was as to the willingness of Swift to pay these notes.

I don't quite understand how what he said yesterday was in conflict with that statement.

Cross-Int. 44. You do not, then, mean to be understood as saying that Jones ever represented to you, either directly or indirectly, that these Swift notes in suit, drawn payable to him (Jones), ever belonged to him (Jones) as his own property, do you; or rested on a consideration furnished by him?

Ans. I haven't said that. I certainly, in July, 1883, thought these notes were Jones's property; and, as I understood him yesterday, he seemed desirous of making a distinction between having the absolute property in the notes and the right to dispose of them; and, taking all his testimony together yesterday, that was the impression I got from it of his intention in making the statement he did.

Cross-Int. 45. Did not Jones himself lead you to think these notes were his property?

Ans. Yes; he did.

Cross-Int. 46. If such was not the fact, then he misled you, did he not?

Ans. Of course.

Cross-Int 47. Do you now believe that these notes were the property of Jones at the time he or Butterfield deposited them with you, — I mean the property of Jones as the beneficial owner of said notes, irrespectively of the legal title therein?

Ans. Well, if you take the statements to be true of Mr. Gregory, a witness in this case, you come to one conclusion; and if you take other statements to be true, I am not quite sure you would come to that conclusion. I have no personal knowledge about it except as I have already stated, and from the testimony I have heard. In July, 1883, it would certainly seem that Jones or Butterfield, either or both, were the legal owner of those notes. Mr. Gregory says that they were given to him (Jones) with certain implied or secret trusts, or lodged as collateral for the payment of money; and if that be true, as between him and Butterfield or Jones, the benefecial interest would be Mr. Gregory's. But I protest against being called as a witness, either to express an opinion in this case upon

the character of witnesses, except upon their general reputation for truth and veracity, or to give a legal construction to their testimony.

Cross-Int. 48. The last interrogatory to you calls for your belief on the point whether these notes, when deposited with you, July 31, 1883, were or were not the property of Jones; that is, whether or not Jones was the beneficial owner of said notes, irrespectively of the legal title. You have not answered that question. Do you decline to do so?

Ans. I have already expressed my opinion as much as I care to on this subject.

Cross-Int. 49. Your opinion was not asked for. Your own personal belief is what is called for by the interrogatory. Will you please express your belief in answer to the interrogatory?

Ans. I have already done that heretofore.

Cross-Int. 50. Do you mean that you have expressed the belief heretofore in your deposition that Jones was the beneficial owner of these notes at the time they were deposited with you?

Ans. I have already given, so far as I understand the word "beneficial," all the belief I care to express. If counsel means by the word "beneficial" that Mr. Jones had a legal title to the notes in July, 1883, when he gave them to me, for which he should in equity account to Mr. Gregory, I think it quite likely it was so.

Cross-Int. 51. You do not, then, mean to contest the point that Gregory was the beneficial owner of these notes at the time they were lodged in your hands, July 31, 1883, do you?

Ans. Mr. Jones says in his testimony that the matter has been entirely settled between him and Mr. Gregory as to the use of these notes in Calais, and I believe his statement to be true.

Cross-Int. 52. Will you be good enough now to answer the last preceding interrogatory?

Ans. I mean to say that as between Gregory, Jones and Butterfield, Gregory is entitled to an account in equity; but what are the elements of that account, I cannot say. If this is what the counsel means by Gregory's having a beneficial ownership in the notes, then Gregory had a beneficial ownership in the notes, according to my present belief.

Cross-Int. 53. You do not, then, intend to dispute the claim of Gregory as the beneficial owner of these notes at the time of the deposit with you, so far as the beneficial ownership of said notes was between Gregory, Butterfield and Jones, do you?

Ans. Counsel means by this, I suppose, What position will be taken by the counsel for the defence in Court? To a great degree I am a mere stockholder in this matter, and I don't expect to manage it in court; but I expect the counsel to make all proper, legal and equitable defences in the case.

Cross-Int. 54. I have tried in vain to obtain from you a statement of your belief at this present time, whether as between Gregory and Jones, Jones, and not Gregory, was the beneficial owner of these notes, July 31, 1883, when deposited with you. I should still like to have you answer the question. If you do not answer it directly, as now repeated to you, I shall assume that you refuse to do so, and leave it in that shape.

Ans. I am very sorry that I have not expressed myself clearly on this point. I certainly have intended to do so, as I had no desire to conceal any fact in the case, but I don't see how I can say more than I have already said.

F. A. PIKE.

Attest: JOHN G. STETSON, *Examiner.*

DEPOSITION OF FRANK H. WILLIAMS.

Direct Examination by FREDERIC A. PIKE, Esq., *Defendant, pro se.*

BOSTON, Oct. 16, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Frank H. Williams; thirty-one; Newton, Mass.; broker, doing business in Boston for nearly five years.

Int. 2. State whether you were in New York in April, 1883, at the time Mr. Butterfield and Mr. Gregory were about to leave for London; and, if so, at whose request did you go there?

Ans. I was there one day before they left, and remained there till they left. I went at the request of Charles F. Jones, who was sick at Young's Hotel in Boston at the time.

Int. 3. For what purpose did you go?

Ans. To bring back some money which Mr. Jones and Mr. Butterfield would give me for him.

Int. 4. And what did you bring back, by whom was it given you, and in whose presence?

Ans. Mr. Butterfield handed me an envelope containing some notes signed by W. C. N. Swift which I saw him put in the envelope, and I think there was no one present when Mr. Butterfield handed them to me. If any one was present, his wife was in the room.

Int. 5. If Mr. Gregory, the plaintiff, gave you any instructions about those notes, or the proceeds of them, please state what they were.

Ans. After the notes came into my possession, at the dinner table that day, Mr. Gregory handed me a note directed to me, with instructions to give it to Mr. Jones.

Int. 6. Have you that note?

Ans. I probably have it among my papers; I couldn't say positively.

Int. 7. Will you examine your papers and see?

Ans. Yes.

Int. 8. What were you instructed to do with that package containing the Swift notes, and what did you do?

Ans. The facts are these: Mr. Butterfield told me that he had no funds to send to Mr. Jones, but to tell Mr. Jones to raise money on the Swift notes in any way. I delivered the notes to Mr. Charles F. Jones immediately upon my return to Boston, giving him the same instructions that Mr. Butterfield had given me.

Int. 9. Did you pay out any money on account of those notes, or from the proceeds of those notes, to Mr. Gregory or his order; and, if so, how much?

Ans. I did no business whatever for Mr. Gregory. All of my business was for Mr. Jones.

Int. 10. Whether Mr. Jones returned any of those notes to you; and, if so, what did you do with them?

Ans. I think he never returned any of those notes, but he did place in my hands notes that the original ones had been exchanged for.

Int. 11. If you can now answer Int. 5, and state what instructions Mr. Gregory gave you as to the Swift notes, please do so.

Ans. This is a copy of the note handed to me by Mr. Gregory after Mr. Butterfield had handed me the Swift notes. It reads as follows: —

"Mr. F. H. WILLIAMS:

Raise some money on the Swift notes. Please go to Frank A. Brooks, lawyer, on Milk Street, and pay him $1,525 in full of a note I made to him lately for $1,525. He will take money and cancel and hand the note to you. Write me care American Exchange, London. Send, also, $500 to Walter A. Greenleaf, agent, 286 Ohio Street, Chicago, as from me for necessary expenses. He will know how to use it.

CHARLES A. GREGORY.

April 9, 1883."

I handed this note to Mr. Jones with the Swift notes.

Cross Examination by FRANCIS A. BROOKS, Esq., *of Counsel for Complainant.*

Cross-Int. 12. Were not two of the Swift notes you received of Butterfield in New York, April 9, 1883, notes of $20,334.60 each, payable to George W. Butterfield or order, and by him indorsed?

Ans. I cannot recollect the amounts of the notes or the number of the notes positively, but I think there were three notes of about $20,000 each, placed in the envelope by Mr. Butterfield. I noticed that they were signed by Mr. Swift, and payable to Mr. Butterfield. I did not take pains to examine them in detail.

Cross-Int. 13. When and how and from whom did you first learn that new notes had been made by Swift, and substituted for those notes received by you from Butterfield?

Ans. I cannot tell exactly when, but I was told by Mr. Jones; and Mr. Jones placed in my hands, to be negotiated, one note of about $15,000, which he said had been exchanged, and this note I negotiated and accounted to Mr. Jones for the proceeds.

Cross-Int. 14. At the time you negotiated this $15,000 note, you knew, did you not, or understood that it had been given by Swift in place of one or more of the notes delivered you by Butterfield in New York, or was so informed by Jones?

Ans. I was so informed by Mr. Jones.

Cross-Int. 15. Did not Mr. Jones learn from you what instructions you had received from Gregory in regard to the use to be made of the money raised on these notes, or some of it?

Ans. I delivered to Mr. Jones the instructions sent by me by both Mr. Gregory and Mr. Butterfield, on my return from New York.

Cross-Int. 16. You were then aware, when you accounted to Jones for the entire proceeds of the $15,000 note, that he or you or both were not following Gregory's instructions, were you not?

Ans. I never had any business with Mr. Gregory, and never had any instructions from him except to deliver to Mr. Jones. I never attempted or agreed to do any business for Mr. Gregory, in any way, shape or manner.

Cross-Int. 17. Did you not, by accepting the note addressed you by Gregory, April 9, 1883, consent to pursue the instructions therein contained, or lead him to believe you intended to do so?

[*Objected to if the question asks the witness to construe the effect of his receiving that note. The question is not objected to, if it calls for any expression he made to Gregory at that time.*]

Ans. The facts are these: At some time during the day after Mr. Gregory knew that I had taken these notes of Mr. Butterfield, he informed me that he had some instructions that he would give me before he left to take back to Mr. Jones; and at dinner that evening he handed me this note, remarking that he had written the instructions that he spoke of, and I never opened the note, and it was given with other papers to Mr. Jones, as the instructions were not to me.

Cross-Int. 18. In your answer to Int. 11, you have produced a copy of this note received by you from Gregory, as I understand it, which is addressed to you and not to Jones. Am I wrong in this?

Ans. The note was addressed to me; the instructions were not intended for me.

Cross-Int. 19. Why do you say the instructions, contained in the note addressed to you by Gregory, were not intended by him as instructions to you?

Ans. They could not have been, because I never had any business relations with Mr. Gregory.

Cross-Int. 20. You say you didn't open this note. How did you ever learn what it contained?

Ans. I was told by Mr. Jones, or he may have allowed me to read it.

Cross-Int. 21. Did you not testify that this note was, as you supposed, in your possession at this time, and that you would endeavor to find and produce the original on this examination?

Ans. I have in my possession all the private papers of Mr. Charles F. Jones, or have had them, and have placed some of them in the hands of his attorney; and this paper is among his papers in my possession, either in my hands or of his attorney.

Cross-Int. 22. This, then, is one of the papers of Mr. Jones in your possession, the contents of which you say were told you by Jones, or he may have allowed you to read it. See answer to Cross-Int. 20. Is this so?

Ans. Yes, sir, in my possession, among his papers.

Cross-Int. 23. And do you now say, that, while this paper was in your possession as the property of Jones, you were allowed by him to read it, and became acquainted with its contents in that way?

Ans. I had permission to read any of his papers in my possession, and at one time made a copy of this paper for his partner, Mr. Butterfield.

Cross-Int. 24. Do you now state that this was the occasion of your first gaining a knowledge of the contents of this paper addressed to you by Gregory?

Ans. I cannot say positively when I first learned of its contents.

Cross-Int. 25. Did you not know its contents within thirty days of its date?

Ans. I can't say positively; I don't remember.

Cross-Int. 26. Didn't you receive from me a request for the payment of the money referred to in Gregory's note of April 9?

Ans. I think I did, as near as I can recollect.

Cross-Int. 27. You knew the contents of the note at that time, did you not?

Ans. I don't recollect whether I did or not.

Cross-Int. 28. Do you not recollect sending me information that you had a note belonging to Gregory to be negotiated, with instructions from Gregory to pay me a part of the proceeds thereof?

Ans. No, sir; I don't recollect anything of that kind.

Cross-Int. 29. Do you mean to say that nothing of that kind occurred?

Ans. Mr. Gregory never placed in my hands any notes of any kind to negotiate. All the business was done by Mr. Jones. I never could have sent such a reply as that to you.

Cross-Int. 30. Did you not send me word to the effect that you held a note for negotiation, from the proceeds of which, as soon as negotiated, you would pay me the sum of $1,500, or thereabouts, for account of Mr. Gregory?

Ans. I may have sent word to you that I was trying to negotiate a note for Mr. Jones, but I could not have sent word to you that I would pay you $1,525, or any other sum, as I had to account to my principal, Mr. Jones, for all money received from the proceeds of my negotiation, if I made any.

Cross-Int. 31. And you now say, as I understand, that you never did send me such a message as is set forth in the last question, or one to that effect?

Ans. It would have been impossible for me to have made such a reply.

Cross-Ans. 32. Do you now swear that you never did make such a reply, or send such a message to me? Please answer yes or no.

Ans. I believe that I never made such a reply or sent such a message.

Cross-Int. 33. You are not willing to swear positively that you never did, are you?

Ans. No.

Cross-Int. 34. What were your relations to Jones in April, 1883, in a business way?

Ans. Acting as his broker.

Cross-Int. 35. You speak of having possession of his papers.

Did you have them merely as his broker, or did you have some other business relations with him?

Ans. They were placed in my safe, as he was going abroad, and he supposed that he would have some legal matters to attend to, and he left his papers for me to be able to attend to any business that he might direct.

Cross-Int. 36. You, then, were to act as his general agent in business matters, were you not?

Ans. I had no specific duties to perform, and nothing was said about any particular business. He simply left them so that if anything came up he would have some one on this side to attend to any business, as he might direct.

Cross-Int. 37. Were you aware of his business relations with Butterfield?

Ans. I was.

Cross-Int. 38. Did you act for Butterfield as well as Jones?

Ans. No, sir, I never did any business with Butterfield whatever, except through Mr. Jones.

Cross-Int. 39. Did Mr. Jones give you full information as to his business affairs with Mr. Butterfield, or profess to do so?

Ans. He told me that they were in partnership together to sell certain mining properties in London. I never knew all of the details of their business together.

FRANK H. WILLIAMS.

Attest: JOHN G. STETSON, *Examiner.*

DEPOSITION OF CHARLES F. JONES.

Direct Examination by FREDERIC A. PIKE, Esq., *Defendant, pro se.*

BOSTON, Oct. 16, 1885.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Charles F. Jones; forty-seven; San Francisco, Cal.; civil engineer.

Int. 2. Did you in January, 1883, go into a mining operation with George W. Butterfield as a partner, to buy certain mines of

Frederic A. Pike? Was the agreement therefor reduced to writing between George W. Butterfield and F. A. Pike?

Ans. I did, and it was.

Int. 3. Was there a payment of money made? If so, how much and by whom?

Ans. There was, of ten thousand dollars ($10,000) by myself.

Int. 4. Did you subsequently take in two partners; and, if so, whom?

[*Objected to as calling for parol evidence of a written contract.*]

Ans. Mr. Butterfield and I did take in two partners, Charles A. Gregory and J. C. Kemp.

Int. 5. What was the proportion each was to have?

[*Same objection.*]

Ans. Butterfield and I three quarters, Kemp and Gregory one quarter.

Int. 6. Did you ever reduce the agreement with Gregory to writing?

Ans. I did not.

Int. 7. Please look at the agreement now shown you with Mr. Kemp, and state if this is the original agreement with him.

[*Objected to as not material.*]

Ans. It is.

[*Agreement shown witness is put in evidence, and marked "Exhibit Kemp Agreement, J. G. S., Ex'r."*]

Int. 8. Was that agreement executed prior to April 9, 1883?

Ans. It was.

Int. 9. Was a parol agreement made with Charles A. Gregory prior to April 9, 1883, similar to the agreement Exhibit Kemp Agreement?

Ans. There was.

Int. 10. Did Mr. Butterfield and Mr. Gregory sail from New York on or about April 9, 1883, to London for the purpose of making a sale of these mines, as referred to in said Kemp agreement?

Ans. They did.

Int. 11. Did, or not, Mr. Butterfield return to this country some ime in July, 1883?

Ans. He did.

Int. 12. Did you, or not, meet Mr. Butterfield and the defendant Pike at a hotel here in Boston, and have some discussion relative to a continuance of that agreement?

Ans. I did.

Int. 13. Did you not accompany Mr. Butterfield and Mr. Pike to Calais on July 27 and 28, 1883, for the purpose of making an arrangement for the extension of the contract of sale made in January, 1883?

Ans. I did.

Int. 14. Was a contract entered into at that time between Mr. Butterfield and Mr. Pike, dated July 31, 1883, for the sale of that property?

Ans. There was.

Int. 15. Is the contract now shown you, marked for identification "Pike-Butterfield Contract of July 31, 1883, J. G. S., Ex'r," the original contract made at that time?

Ans. It is.

[*It is agreed that the contract above referred to is the same as that copied into the complainant's bill.*]

Int. 16. Did you go to London in August, 1883; and, if so, at what date did you arrive in London?

Ans. I arrived in London, I think, about the twenty-fifth day of August, 1883.

Int. 17. How soon thereafter did you see the plaintiff Gregory?

Ans. The next day.

Int. 18. Did he make inquiries of you whether or not the contract with Pike had been extended; and, if so, on what terms?

Ans. He did.

Int. 19. Did you tell him fully the terms of this contract of July 31, 1883, which you have already identified?

Ans. I did.

Int. 20. Did you make any arrangement with him about the use of these Swift notes, as specified in this contract; and, if so, what?

Ans. I told him the nature of the contract.

Int. 21. Did you have any talk about the use of the Swift notes in making the contract of July 31, 1883, and did you make any

arrangement with him on account of the use of those notes; and, if so, what was the arrangement you made with him?

Ans. No, not about notes; I will qualify it by saying "note". I made an arrangement to give him one hundred thousand dollars out of my individual interest in the sale of the mining properties we were all interested in, and he to give his hearty co-operation in prosecuting the sale.

Int. 22. Did, or not, this arrangement include the agreement of July, 1883; and, if so, what interest was Mr. Gregory to have in that contract of July, 1883?

Ans. It did; one eighth.

Int. 23. What, then, did you do, if anything, towards the completing the sale of that property specified in the contract of July 31, 1883?

Ans. I spent thousands of dollars of my own money in sending experts and one of the board of directors of the company incorporated in London, to examine and report upon said properties.

Int. 24. Was the plaintiff, Gregory, aware of what you were doing at that time, and were you, or not, in constant communication?

Ans. He was, and we were almost day and night in constant communication, boarding in the same house.

Int. 25. Did this state of things continue during the months of September, October and November?

Ans. It did.

Int. 26. What view did you and Mr. Gregory, during these months, take of the prospects of sale of that property to the London company, which had been organized for the purpose of buying it?

[*Objected to so far as Mr. Gregory's view is concerned.*]

Ans. We were pretty sure we were going to make a sale.

Int. 27. What opinion did Mr. Gregory express from time to time concerning your prospects of sale during those three months?

Ans. He, like myself, believed that a sale was certain, but that we might have to reduce the price some, the original price being five millions of dollars.

Int. 28. During those three months, did he express any dissat-

isfaction with the use that had been made of the Swift notes in making this contract of July with Butterfield?

[*Objected to as assuming facts which have not yet been proved.*]

Ans. He did not; no mention whatever was made of it.

Int. 29. Did, or not, Mr. Gregory express any dissatisfaction as to the use of the Swift notes in the month of December, 1883; and, if so, was it before or after the arrival of the expert and director that you have already said you sent to California to examine the property?

Ans. He did. Yes, after the arrival of the expert and director.

Int. 30. What was the report, favorable or unfavorable; and did, or not, the sale break up at that time, after the return of these parties?

[*Objected to as immaterial.*]

Ans. Unfavorable, and the director wanted to throw out of the group of mines to be sold those directly belonging to Mr. Gregory and his associates, other than myself and Mr. Butterfield, and the sale broke down.

Cross Examination by FRANCIS A. BROOKS, Esq., *of Counsel for Complainant.*

Cross-Int. 31. The two notes in suit had been pledged to the defendant Pike without the previous knowledge and consent of Mr. Gregory, had they not?

Ans. I could not say.

Cross-Int. 32. So far as you know, had they not been pledged, July 31, 1883, without Gregory's knowledge?

Ans. I cannot positively say.

Cross-Int. 33. Why cannot you positively say?

Ans. Because Mr. Butterfield about that time sent a cablegram to Mr. Gregory telling him that he intended using note.

Cross-Int. 34. You were knowing to the fact of this cablegram being sent at the time it was sent, were you?

Ans. I think I was.

Cross-Int. 35. Do you not know that that cablegram was not sent until after July 31, 1883?

Ans. I do not, and that is the reason why I could not answer the other question directly.

Cross-Int. 36. Where were you and Butterfield when the cablegram was sent to Gregory?

Ans. In Boston.

Cross-Int. 37. Who had possession of the two Swift notes in suit at the time of the interview between you and Mr. Pike before you went to Calais with him?

Ans. I do not know whether I gave them to Mr. Butterfield, or whether I retained them.

Cross-Int. 38. Did you know the replies received from Gregory to the cablegrams sent by Butterfield about these notes, or one of them; I mean what such replies were?

Ans. I did know them at the time.

Cross-Int. 39. Was not the last reply from Gregory in the words following, or to this effect: "Prefer not use note. I forbid use note except increased interest"?

Ans. It was.

Cross-Int. 40. You then knew that Gregory refused to allow the notes to be used as desired, did you not?

Ans. I did.

Cross-Int. 41. Up to the time you left for London, in August, 1883, Gregory had not consented to any such use of the note, had he, so far as you know?

Ans. Except such as the cablegram that you refer to, about the increased interest, permitted.

Cross-Int. 42. Do you mean that he consented to the use made of the note or notes upon any terms whatever, before July 31, 1883?

Ans. I do not.

Cross-Int. 43. When you left Boston for Calais with Mr. Pike and Mr. Butterfield, July 27 or 28, 1883, did you or Butterfield expect to make the payment required to save the contract of January, 1883, for the sale of the mining property, which expired July 30, 1883, or did you expect to default on that contract, and make another, if you could, for the purchase of the same property?

Ans. We expected to default and make a new contract, or in other words, to get a new bond of the property.

Cross-Int. 44. Did you expect, I mean either you or Butterfield, or both, to use these Swift notes in procuring a new bond of the property from Mr. Pike?

Ans. There was no definite understanding until we went to Calais, Me., and he (Pike) had had a conference with his associates.

Cross-Int. 45. I don't see that you have answered the last question; will you please do so?

Ans. Mr. Butterfield said, if necessary, he would use the Swift note.

Cross-Int. 46. And said this before going to Calais, did he not?

Ans. Yes.

Cross-Int. 47. Butterfield, then, had these notes in his possession, had he not?

Ans. I cannot say whether at that time he had or had not.

Cross-Int. 48. If he had not possession, then you had, had you not?

Ans. Yes.

Cross-Int. 49. And if you had them, you held them subject to his order, did you not?

Ans. I did.

Cross-Int. 50. You never owned any interest yourself in these notes, did you?

Ans. I regarded these notes as my own to dispose of, to part with in any way, shape or form, at the time Mr. Butterfield, Mr. Gregory and Mr. Kemp left for England.

Cross-Int. 51. [*Question repeated.*]

Ans. I had advanced thousands upon thousands of dollars in this enterprise, and was the only one of all concerned who ever put in a dollar up to that time; and when Mr. Butterfield informed me that those notes were his, and sent them to me by hands of Mr. Williams, I was perfectly satisfied that I was privileged to use them for my own benefit.

Cross-Int. 52. You mean, if I understand you, to state by your last answer, that you considered yourself entitled to treat these notes as your own when Butterfield sent them to you, and informed you that they were his. Is that what you mean?

Ans. Exactly, yes.

Cross-Int. 53. As, then, between you and Butterfield, who was the owner of these notes after they came into your hands?

Ans. Both of us.

Cross-Int. 54. In what shares did you and Butterfield own them?

Ans. I had advanced Butterfield thousands of dollars under an agreement between us which allowed either one or the other a legal interest or right to any excess of capital contributed to the joint fund. I mean for the purchase of the mining property of the defendant Pike.

Cross-Int. 55. You were aware, were you not, that these notes originated in a sale made to Swift of Gregory's interest in a mine in California, or of eighty thousand shares owned by him?

Ans. I was.

Cross-Int. 56. And that this sale was effected by Butterfield for Gregory?

Ans. I was not; I know it was effected by Butterfield, but I don't know for whom.

Cross-Int. 57. Did you not know the fact that Gregory was the owner of these eighty thousand shares?

Ans. I did.

Cross-Int. 58. Did you not, then, understand that the notes given by Swift, in purchase of these shares, were given in payment for property previously belonging to Gregory?

Ans. I did.

Cross-Int. 59. Why, then, did you not know or understand that the notes when given really belonged to Gregory, if his property furnished the consideration for the notes?

Ans. Mr. Butterfield dealt directly with Mr. Gregory and Mr. Kemp; I had nothing whatever to do with the negotiations. Butterfield told me the notes were his. The cash he had received from Mr. Swift he paid over to Mr. Gregory and Mr. Kemp.

Cross-Int. 60. The cash so paid was, if I am correctly informed, paid April 9, 1883, in New York by Butterfield to Gregory. Was it after this that Butterfield told you the notes were his?

Ans. It was not; it was previous to his going to New York,

and at about the time of the completion of the negotiations for the sale.

Cross-Int. 61. The notes sent you from New York by Butterfield were by you surrendered to Swift in exchange for new notes, were they not?

Ans. Yes.

Cross-Int. 62. Why were these new notes made payable to you?

Ans. Because I regarded them as mine, to do as I pleased with them, and because Mr. Butterfield had made a written contract with Mr. Swift not to negotiate any of said notes without his consent; and in getting the assistance of Mr. Swift in raising money for the prosecution of the sale, I made the proposition to have the notes put in that form.

Cross-Int. 63. In the examination of yourself before S. K. Hamilton, as a master in chancery, you were asked this question in regard to these notes: —

"Have you ever received any notes from W. C. N. Swift belonging to any one?"

Your answer to this question was in these words: —

"I did receive five notes from said Swift, which I supposed at the time belonged to George W. Butterfield, and two of which, I now understand, Mr. Gregory claims; but whether they belong to Butterfield or Gregory I do not know; they do not, nor did they ever, belong to me, nor did I ever have any interest in them."

Did you not make such an answer to this question?

Ans. I did.

Cross-Int. 64. Was that answer true when made?

Ans. It was; that those notes were, as I had supposed, owned by G. W. Butterfield, and that I had a perfect right to use said notes for my own benefit in any way, shape or form; but as for having any direct interest in said notes, I had not.

Cross-Int. 65. You also stated in your examination before Hamilton, master, that you received the two notes in suit from F. H. Williams; that Mr. Williams gave them to you because he was so instructed by Mr. Butterfield, the man whom you have supposed was the owner; and in answer to the question for what purpose you

received and held these notes, you answered, according to my copy of the examination, in these words: —

"144 *Ans.* As the agent of Mr. Williams, not any interest in them belonging to me."

Did you make such an answer at that time?

Ans. No, I believe not.

Cross-Int. 66. The next question put you was in these words: —

"Were you and Mr. Butterfield then in business together, and, if so, in what business?"

Your answer was in these words, according to my copy of the examination: —

"We were not in business together, except he employed me to assist him in certain mines, and for that service I was to receive three eighths of the net profits; but the mines were not sold, and I have lost all my money, and have received nothing by way of profit."

Did you make that answer?

Ans. I made that answer, and I qualified it, that we were all in one sense mining partners; I to receive three eighths profit, Butterfield three eighths, Kemp one eighth, and Gregory one eighth: and Mr. Butterfield was the head and front of all the enterprise. All contracts and deeds were made by him.

[*Adjourned.*]

BOSTON, Oct. 24, 1885.

Present: FRANCIS A. BROOKS, Esq., *of Counsel for Complainant;*
THOMAS H. TALBOT, Esq., *of Counsel for Defendant, Pike;*
HENRY W. SWIFT, Esq., *of Counsel for Defendant, Swift.*

Cross Examination continued by Mr. BROOKS.

Cross-Int. 67. Butterfield and yourself allowed the contract with Pike of Jan. 29, 1883, to become forfeited before the contract of July 31, 1883, was concluded and signed, did you not?

Ans. I was cognizant of the fact that Butterfield allowed the contract to be forfeited, and I assented to it.

Cross-Int. 68. And in doing so you knew, did you not, that the contract of January, 1883, might have been saved by a payment of $10,000 to Pike?

Ans. I did not.

Cross-Int. 69. Did you not, on or before July 31, 1883, know that the contract of January, 1883, with Pike might have been extended sixty days with Pike's consent, if a payment of $10,000 were made to him on account, as stated by him in his answer to Int. 35 of his deposition in this case?

Ans. Not that I can remember; all negotiations with Pike were made by Mr. Butterfield.

Cross-Int. 70. Were either you or Butterfield able to pay $10,000 in money to Pike on July 30, 1883, when the first contract matured, and when you were both together at Calais?

Ans. No.

Cross-Int. 71. Did you not take two notes drawn by defendant Swift and payable to the order of George W. Butterfield, each for the sum of $20,334.60, dated April 4, 1883, one payable in two years and one payable in three years from date to the maker Swift, and obtain from him the two notes here in suit, one for $20,334.60 and one for $15,000, both dated April 20, 1883, and drawn payable to yourself and not negotiable?

Ans. I cannot say positively whether these notes were the ones claimed by Mr. Gregory or not, as I gave to Mr. Swift four notes of $20,334.60 each, and received therefor five notes, one of $10,000, two for $15,000 and two for $20,334.60 in exchange, same payable to myself. These four notes, which I delivered to Mr. Swift in exchange for the five notes which I received from him, were forwarded to me by Mr. Butterfield, who represented that the same were his property, and I was authorized by him to raise $25,000.

Cross-Int. 72. You have not answered Cross-Int. 71. Did you not obtain from the defendant Swift the two notes which were lodged in the defendant Pike's hand July 31, 1883, in exchange or substitution for other notes of equal amount dated April 4, 1883, and signed by Swift, and payable to the order of George W. Butterfield, and by said Butterfield sent to you from New York, April 9, 1883, by the witness Williams, who has testified in this case?

Ans. I did.

Cross-Int. 73. Why did you procure the notes lodged with Pike in exchange for the notes sent you by Butterfield from New York?

Ans. I applied to Mr. Swift to negotiate loan of $25,000 on said notes. He thereupon informed me that he had an agreement with Mr. Butterfield that said notes should not be negotiated. I then explained to him the situation in which I had been left by Mr. Butterfield, from whom I expected to have received $25,000, but instead of that amount he had sent me these notes on which to raise that amount. I importuned Mr. Swift to assist me in the matter of raising said amount, and that I did not want to do anything contrary to his agreement with Mr. Butterfield.

It was proposed by Mr. Swift to give two negotiable notes of $10,000 and $15,000 respectively on four and six months, with which I could obtain the said $25,000, and one note of $15,000 and two of $20,334.60 each should be made non-negotiable. The $15,000 note, I think, was for two years, and the others, two notes I think, for three years each. The two notes of $10,000 and $15,000 on four and six months were made payable to myself or order and were negotiable. The other three were made payable to Charles F. Jones.

Cross-Int. 74. Did you raise the money on the two notes for $10,000 and $15,000 respectively, or either of them?

Ans. I raised the money on the $10,000 note by putting up $10,000 in stock as collateral security to the Wareham National Bank, I think, and left about $25,000 additional stock with Mr. Williams, who raised the other $15,000. Both these notes were discounted. I received the proceeds of the $10,000 note, and Mr. Williams the proceeds of the $15,000 note, which he held subject to my order.

Cross-Int. 75. You then received or got the benefit of $25,000 raised in this way, did you not?

Ans. I did.

Cross-Int. 76. Did you not represent to Mr. Swift that you were acting in this matter as the agent or representative of Butterfield, and not as the owner of these notes in your own right?

Ans. I don't remember saying anything on that subject.

Cross-Int. 77. You did not then give Mr. Swift to understand

that you were not the owner of these notes in your own right, did you?

Ans. I do not remember having said anything on that subject. I stated to Mr. Swift what Mr. Butterfield had promised to do in the way of money matters, and instead of sending me money, he sent me these notes, as I have before stated.

Cross-Int. 78. Did not Mr. Swift show any desire to know who was the actual owner of these notes, or make any inquiry of you to that effect?

Ans. Not that I remember. It was only after a great deal of persuasion that Mr. Swift consented to make the exchange which I have before mentioned, and then only on condition that I would take up the two negotiable notes when the same became due.

Cross-Int. 79. Were you ignorant, until Mr. Swift informed you of the fact, that Butterfield had agreed with Swift that the notes which you took to him for exchange should not be negotiated?

[*Objected to as implying something that has not been proved in this examination.*]

Ans. I think Mr. Butterfield told me that he had agreed with Mr. Swift not to negotiate the notes without his consent, or something to that effect.

Cross-Int. 80. Did not Mr. Swift also tell you the same thing, when you went to him to get these notes changed?

Ans. He did, and I think showed me a contract that Mr. Butterfield had signed to that effect.

Cross-Int. 81. You then honored Mr. Butterfield's contract by taking three of the new notes in a form not negotiable, did you not?

Ans. I did.

Cross-Int. 82. Did you not, by doing so, treat these new notes, or three of them, as the property of Butterfield, or intend to do so?

Ans. I did.

Cross-Int. 83. You were, I believe, arrested in a suit brought against you in this county by Charles A. Gregory; such suit being brought to hold you liable to him, Gregory, as for the conversion to your own use of the two notes lodged with Pike, July 31, 1883,

and yourself sued out a writ of *habeas corpus* to release yourself from such arrest. Is that so?

Ans. It is.

Cross-Int. 84. And hearing was had in the Supreme Court of Suffolk County on your writ of *habeas corpus*, and you testified as a witness in such hearing, did you not?

Ans. I did.

Cross-Int. 85. In the course of that examination, a copy of which I now hold in my hand, it appears that you produced a certain paper in answer to an interrogatory, which interrogatory and answer are as follows: "*Int.* In whose handwriting is that paper? *Ans.* It is signed by Charles A. Gregory."

[*Paper put in and marked "A," being an agreement on the part of Gregory that the notes of W. C. N. Swift held by Butterfield should not be called for by Gregory until he gave Butterfield security that the negotiations should be carried out.*]

Do you recollect the paper A referred to in this interrogatory and your answer thereto?

Ans. I don't remember it now. At the time of these negotiations with Butterfield, Gregory and Kemp, I was ill with pneumonia in Young's Hotel, and after they started for New York, I knew nothing of their transactions.

Cross-Int. 86. Do you not recollect the circumstances of producing a paper of the character referred to in the copy of your evidence?

Ans. I do not.

Cross-Int. 87. Have you any doubt of the fact that you did produce such a paper or refer to it in your testimony?

Ans. I cannot say; I can't remember; I was excited at the time, and probably things transpired that I can't remember now.

Cross-Int. 88. If you had such a paper and produced it on such examination, where is that paper now?

Ans. I do not remember of ever having seen any such paper.

Cross-Int. 89. The question is, whether, if you did have it and did see it and did produce it, where it now is.

Ans. It would be in the hands of E. P. Brown, my attorney, at that time.

Cross-Int. 90. Is the E. P. Brown, your attorney at that time, now a refugee from this State, and inaccessible at this time?

Ans. I am so informed and believe it is true.

Cross-Int. 91. Have you no recollection that a paper of the character referred to in your examination in the *habeas corpus* case was ever seen by you or known to exist?

Ans. I cannot recollect ever having known of it until my examination in the *habeas corpus* case.

Cross-Int. 92. State what occurred on that occasion with reference to that paper.

Ans. I don't remember.

Cross-Int. 93. You have stated to me that a paper of the character referred to in Cross-Int. 85 was brought out in evidence on the occasion of the hearing of the *habeas corpus* case, and was produced, as I understood you, by Mr. Gregory and not by you. Did I understand you correctly?

Ans. I have an indistinct recollection that some contracts between Butterfield and Gregory were then put in evidence, but which they were I cannot say.

Cross-Int. 94. You have not met the inquiry put you in the last interrogatory. I wish you either to refuse to answer or to make an answer to that question.

Ans. You did not understand me correctly, because I cannot remember what paper you refer to.

Cross-Int. 95. Did I not read to you just now a paper, which I suppose to be a copy of the paper A mentioned in your examination in the *habeas corpus* case, and, on hearing the same read by me, did you not remark that you did recollect that a paper of the kind read by me was produced on that occasion by Mr. Gregory himself. If you did not so remark, state wherein I am correct in this interrogatory and wherein incorrect.

[Mr. TALBOT *objects to the examination of the witness concerning a paper merely supposed by* Mr. BROOKS *to be a copy of some other paper.*]

Ans. I did not so state. What I stated was that some agreements between Mr. Butterfield and Mr. Gregory were produced at

said trial by Mr. Gregory, which I stated was the first I had any knowledge of.

Cross-Int. 96. When first did you learn, in any way, that Gregory had an interest in these notes now held by Pike?

Ans. I was informed by Mr. Butterfield on his return from Europe in July, 1883, that Mr. Gregory claimed the note of $20,334.60, I think; but Mr. Butterfield stated that the note was his, and that he would use the same or do with it as he pleased, or words to that effect.

Cross-Int. 97. You did not then claim this note as your own as against Butterfield, did you?

Ans. I did not.

Cross-Int. 98. Was this conversation between you and Butterfield had with reference to the use of these notes in dealing with Pike, the defendant in this case?

Ans. It was.

Cross-Int. 99. I now show you an order, dated London, Dec. 13, 1883, on F. A. Pike, purporting to be signed by G. W. Butterfield, in which Pike is requested to deliver a Swift note of $20,334.60, dated April 20, 1883, to Charles A. Gregory, in which order are these words referring to said note: —

"placed in your possession by me the same being the property of said Gregory now and at the time I placed the same in your possession."

Whether or not the signature to this order is in the handwriting of G. W. Butterfield?

[*Objected to by both* Mr. TALBOT *and* Mr. SWIFT, *unless the paper is put into the case. The paper is marked for identification, "Cross-Int. 99, to Jones, J. G. S., Ex'r."*]

Ans. I should say that it was, from all I know of his handwriting. I have no doubt of it.

Cross-Int. 100. Did you not engage with Mr. Swift, either verbally or in writing, that the notes drawn payable to Charles F. Jones and not negotiable should not be negotiated by you?

Ans. I did, I think both orally and in writing.

Cross-Int. 101. Had you forgotten this fact when you consented to these notes going into Pike's possession, July 31, 1883?

Ans. I had not.

Cross-Int. 102. Did you not violate your agreement with Swift, in that respect, in the use which was made of the notes with Pike?

Ans. It was not so intended. Mr. Butterfield was informed of the agreement with Mr. Swift, and he did not consider this a negotiation of the note, or, in other words, a violation of the contract.

Cross-Int. 103. And you didn't so consider it, did you?

Ans. I did not.

Cross-Int. 104. You mean by this, I suppose, that the notes were not parted with by you to Pike?

Ans. No, I could not say that. It was supposed at the time that the sale of the May Lundy mine and other properties would be consummated, and the amount due Mr. Pike and his associates paid them in full, it being verbally understood that this note would be given back when that was done.

Cross-Int. 105. You withheld from Pike, did you not, the fact that you had agreed with Swift not to negotiate these notes?

Ans. I did; nothing was said about it.

Cross-Int. 106. When you stated in answer to Int. 21, that you made an arrangement with the plaintiff Gregory to give him $100,000 out of your interest in the sale of the mining properties, you did not mean to be understood that you had any such sum of money or was able to pay him any such sum unless a sale of said mining properties should hereafter be made, did you?

Ans. I did not; I meant it to be out of my share of the proceeds of the sale.

Cross-Int. 107. It was then a promise made by you based wholly upon the contingency of such sale, was it not?

Ans. It was.

Cross-Int. 108. Do you now say that you have no recollection of having seen a paper signed by Gregory in which he agreed that the notes of Swift held by Butterfield and belonging to him, Gregory, should not be called for by him, Gregory, until Butterfield was secured that his, Butterfield's, agreement with Swift respecting the negotiation of said notes should be carried out?

Ans. I do not; all that I remember is that some papers were

produced on the hearing of the *habeas corpus* case which I had never seen before or known of, and this may have been one of them, but this I do not remember.

Cross-Int. 109. Do you not recollect the fact that a paper of this kind was produced by some one at the hearing of the *habeas corpus* case?

Ans. I do not. I cannot state differently from what I have already done.

Cross Examination by HENRY W. SWIFT, Esq., *of Counsel for the Defendant, W. C. N. Swift.*

[*Objected to by* Mr. TALBOT *that the co-defendant, Swift, has no right to participate in this examination.*]

Cross-Int. 110. To whom were the four notes which you gave up in the exchange with Mr. Swift, on April 20, 1883, made payable, and were they indorsed, and, if so, to whom?

Ans. They were all of them made payable to G. W. Butterfield, or order, and indorsed by him.

Cross-Int. 111. Were they indorsed to you in blank?

Ans. I think in blank.

Cross-Int. 112. Do you know for what those four notes were given to Butterfield?

Ans. Not personally, but from information.

Cross-Int. 113. Did Mr. Butterfield ever tell you for what they were given, and what did he tell you?

[*Objected to by* Mr. BROOKS *as calling for hearsay evidence.*]

Ans. He did. He told me that they were given in part payment for, I think, 160,000 shares of stock in the Great Sierra Mining Company, I think.

Cross-Int. 114. Did he tell you whether anything else was given in payment for that stock, and, if so, what?

[*Same objection.*]

Ans. He did. He said he received $10,000 in money, I think that was the amount, in addition to the notes.

Cross-Int. 115. What was the price per share?

[*Same objection.*]

Ans. I believe about fifty-seven cents a share; Mr. Butterfield so informed me.

Cross-Int. 116. Did Mr. Butterfield, at the time of the sale, or about that time, make any statement to you with regard to the value of these shares, and, if so, what?

[*Objected to by* Mr. BROOKS *for substance.*]

Ans. He said he considered the property, the mining property, worthless.

Cross-Int. 117. Do you know what the present value of these shares is, or if they have any value, and, if so, what?

[*Objected to by* Mr. BROOKS *as incompetent.*]

Ans. I have been informed that the property has been a complete failure.

Cross-Int. 118. At the time these notes were exchanged on April 20, 1883, four notes were given up by you to Mr. Swift, and five notes given by him to you; is this not so?

Ans. It is.

Cross-Int. 119. Is it not also true that the five notes given by Mr. Swift at that time were given generally in exchange for the four notes given up by you to him, without any particular note being given in exchange for any particular note given up?

Ans. Yes, that is true.

Cross-Int. 120. What was done by you with the twenty-five thousand dollars ($25,000) received from the two negotiable notes which were discounted; was it used for your individual benefit, or for the benefit of other persons, and, if the latter, for whom?

Ans. It was not used for my individual benefit, but for the benefit of all the partners in the operation, the sale of the May Lundy and other mines.

Cross-Int. 121. You stated in answer to one of the interrogatories by Mr. Brooks, that you made an oral agreement to take up these two negotiable notes. Did you, in fact, take them up, or either of them, or any part of either of them?

Ans. I did not.

Cross-Int. 122. Is the document which I now hand you, purporting to be signed by you, signed by you? Is that your signature?

Ans. It is.

Cross-Int. 123. When is it dated?

Ans. April 20, 1883.

Cross-Int. 124. Was that executed at the time of the exchange of the notes?

Ans. It was.

Cross-Int. 125. Will you please now read the document aloud, to be taken down by the examiner?

Ans. I will. It is as follows: —

BOSTON, April 20, 1883.

In consideration of one dollar to me in hand paid, receipt of which I hereby acknowledge, I hereby agree with W. C. N. Swift of New Bedford, Mass., that I will not negotiate the following notes of his, made payable to me, or sell or transfer my right or interest in them, provided I can do so to any person or persons, but will keep them in my possession until they mature.

Note dated 4m° 20th, 1883, @ two years . . .	$15,000.00
Note dated 4 " 20th, 1883, @ three years . .	20,334.60
Note dated 4 " 20th, 1883, @ three years . .	20,334.60

CHARLES F. JONES.

Witness: W. H. AIKEN.

Cross-Int. 126. Mr. Butterfield was informed of the existence of such an agreement, was he not?

Ans. He was.

Cross-Int. 127. When you stated, in answer to Mr. Brooks, that you did not regard the pledging of the notes to Pike as a violation of this agreement, did you not mean that you expected that the sale of the May Lundy mine would be consummated, and the notes given back by Pike without Mr. Swift's knowing anything of the matter, and without his being inconvenienced by it? That was your meaning, was it not?

Ans. It was.

Cross-Int. 128. Did Mr. Pike ask any questions about the existence of such an agreement at the time of the pledge?

Ans. He did not.

Cross-Int. 129. Have you any present interest as the payee of these notes given by Mr. Swift, or in any of them?

Ans. I have not.

Cross-Int. 130. At the time these notes were given, was there not some conversation with regard to the extension of the time of payment when they became due, if desired by Mr. Swift, and, if so, what was it?

[*Objected to by* Mr. BROOKS. *because calling for parol evidence to qualify a written contract.*]

Ans. I think there was. I felt very grateful to Mr. Swift for assisting me out of my money difficulties at that time, and such question may have been asked me, which I would, of course, have assented to. I cannot remember fully what did take place.

Cross-Int. 131. By assisting you out of your money difficulties, you refer to the giving of the two negotiable notes, or what?

Ans. I refer to the giving of the two negotiable notes.

Cross-Int. 132. That enabled you to realize $25,000 immediately, instead of waiting two years for the first notes given by Butterfield to become due, did it not?

Ans. It did.

Cross-Int. 133. Was the action brought in your name against Mr. Swift, which is now pending in this Court, being an action on the $15,000 note which was payable April 20, 1885, brought with your permission or by your authority or not? I do not refer to any implied authority which may have arisen from the alleged pledge to Mr. Pike. I mean, was there any permission or authority apart from that?

Ans. My attorney, E. P. Brown, got me to sign some paper at the time I was under arrest, the contents of which I do not know, as I have never seen it since. It was a paper assigning to Mr. Gregory. I am now informed by Mr. Brooks that that paper had no relation to the suit in question. I know of no other authority or permission given by me.

Cross-Int. 134. What claim does Mr. George W. Butterfield now make in regard to the right of possession or the right to receive the proceeds of any or all of the notes given by Mr. Swift? If you know what his claim is, state it.

[*Objected to as incompetent.*]

Ans. I do not.

Cross-Int. 135. Do you know whether he makes a claim or not?

[*Objected to by* Mr. BROOKS, *as calling for statements of Butterfield to his witness.*]

Ans. He told me in San Francisco last January that he was going to get that note and nobody else would; and since then I have not had any conversation with him on that or any other matter. In fact, I have not seen him.

[Mr. TALBOT *objects to the answer as giving Butterfield's statement.*]

Cross-Int. 136. Do you know whether Mr. J. C. Kemp van Eé has or claims to have any interest in any of these notes, and, if so, what?

[*Objected to by* Mr. BROOKS *as immaterial and as calling for hearsay evidence.*]

Ans. I do. He informed me in London, last April, that the note of $15,000 was as much his as Mr. Gregory's, and that he had served notice of some kind on Mr. Swift to that effect.

[*Answer objected to by* Mr. TALBOT *as giving hearsay testimony.*]

Cross Examination resumed by Mr. BROOKS.

Cross-Int. 137. Were you not in London in December, 1883, with Gregory and Butterfield when Gregory asked Butterfield to give him an order on Pike for the two Swift notes then in Pike's hands, and did not you know or hear of this request at or about the time it was made?

Ans. I was, and I did.

Cross-Int. 138. Did you not then learn the fact, that such order or orders were given by Butterfield to Gregory?

Ans. I knew that there were some orders given by Butterfield, but the nature of which I did not know, as the transactions were all done privately and without my knowledge.

Cross-Int. 139. Did you not personally object to such orders being given by Butterfield, when both Gregory and Butterfield were present, or advise Butterfield against giving such orders?

Ans. I did not.

Direct Examination resumed by Mr. TALBOT.

Int. 140. Will you please examine, in the printed record of this case, the exhibit which commences on page 18 near the bottom and

closes on page 22, and say whether that is substantially a copy of the paper which it purports to be?

[*Objected to by* Mr. BROOKS, *as it does not appear that the witness was present or had any means of knowing whether it is such copy or not, and it does appear that the exhibit or the execution thereof was witnessed by W. A. Munroe, a lawyer of this city, whose evidence alone is competent for the purpose of the inquiry.*]

Ans. To the best of my recollection and belief, it is.

Int. 141. Upon what is this recollection based?

[*Same objection.*]

Ans. Upon the fact that I paid the $10,000 cash therein mentioned.

Int. 142. Was this payment made at the time of the execution of the contract, and did you see the original contract at that time?

Ans. Five thousand dollars ($5,000) was paid at that time, and five thousand dollars ($5,000) about the first of February ensuing the date of the agreement. I did see the original contract.

Int. 143. Will you please examine the paper which I now hand you, headed "The May Lundy Company Limited," and tell what you know about that paper?

[*Objected to by* Mr. BROOKS *as not the proper subject of re-examination of this witness, and not in reply to anything brought out on cross examination.*]

Ans. That paper shows the formation of a company in London, called The May Lundy Company Limited, for the purchase of the May Lundy, Lake View and Lucky Morton mines, then owned by Mr. Pike and associates, and also a group of properties called the Silver group, controlled by Mr. Gregory, and two other groups called the Hawk and Carpenter groups, in which Mr. Butterfield, Mr. Gregory, Mr. Kemp van Eé and myself were interested.

[*Paper shown witness is put in evidence and marked "Exhibit May Lundy Company, J. G. S., Ex'r." The plaintiff objects to the same.*]

Int. 144. Was this copy ever in your possession before? If so, when did you receive it and what did you do with it, to the best of your recollection?

[*Objected to by* Mr. BROOKS *as to Int.* 143.]

Ans. I think it was. I think I got it in London and mailed it to Mr. Pike, Calais, Me., as I had promised to give him all information I possibly could concerning the sale of the mines. I think this was the latter part of August or beginning of September, 1883.

Int. 145. Was that prospectus in circulation in and about London in the year 1883, and, if so, how late?

[*Same objection.*]

Ans. It was until the return of one of the directors, Mr. Walker, from an examination of the mines in company with an expert.

Int. 146. When did Mr. Walker return?

Ans. I think about Nov. 15, 1883.

CHAS. F. JONES.

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 9.

STIPULATION.

[FILED WITH EXAMINER, OCT. 19, 1885.]

It is agreed in the above-entitled cause, that the defendant may file interrogatories to the plaintiff Gregory, which, with cross-interrogatories, shall be answered by him, Gregory, forthwith, and used as evidence in said cause; and that when said evidence of said Gregory is returned and filed in Court, and Charles F. Jones shall have appeared and submitted himself to further cross examination by plaintiff, the case may be set down for hearing on plaintiff's motion, and heard at the earliest day the Court will fix for the purpose.

It is also agreed that Fox and Kellogg, named in the contract of July 31, 1883, made and deposited the deeds of their interest in said mines in accordance with the terms of the contract.

It is further agreed that the defendant Pike was never notified in regard to any action had or taken by the Trust Company, as provided in said contract of July 31, 1883, that he should be notified of within thirty days.

F. A. BROOKS,
For Plaintiff.
T. H. TALBOT,
For Defendant, PIKE.

EXHIBIT 10.

STIPULATION.

[FILED SEPT. 25, 1886.]

It is agreed that the title deeds to the mining property, made by the defendant Pike and placed in escrow in the hands of the Union Trust Company of New York, to be passed over on payment of the price thereof as set forth in the contract of July 31, 1883, marked "Exhibit A," were received back from said Trust Company by said Pike pursuant to the terms of said agreement, and never went into the hands of said Butterfield or of the grantees therein named; these deeds were taken from said Trust Company by said Pike, probably in the month of January, 1884, after he, Pike, had seen the plaintiff Gregory and had been informed or assured by him that the purchase money would not be paid in accordance with the contract.

F. A. BROOKS,
Solicitor for Plaintiff.
T. H. TALBOT,
Solicitor for Defendant, PIKE.

EXHIBIT 11.

DEPOSITION OF J. C. KEMP VAN EÉ.

Direct Examination by HENRY W. SWIFT, Esq., *of Counsel for Defendant, William C. N. Swift.*

Int. 1. Please state your name, age, residence, and occupation.

Ans. J. C. Kemp van Eé; thirty-three; now in London, where I have resided for about three years, but I am a native of this country; mining engineer.

Int. 2. Did you know of a sale of shares in the Great Sierra Mining Company, made by George W. Butterfield to William C. N. Swift of New Bedford, on or about April, 1883?

[Mr. TALBOT *objects to all testimony tending to invalidate Pike's title to the notes in controversy, and to all testimony not pertinent to the maintenance of the defendant Swift's defence as against the bill of the plaintiff Gregory.*]

Ans. Yes.

Int. 3. Do you know how many shares, or about how many, were sold by Butterfield to Swift at that time? If so, how many?

Ans. About one hundred and sixty thousand shares.

Int. 4. Do you know to whom these shares belonged, and by whom they were transferred to George W. Butterfield? If so, please state.

Ans. About seventy-nine thousand shares belonged to myself; the balance, I believe, belonged to Charles A. Gregory.

Int. 5. For what purpose were these shares transferred to Butterfield?

Ans For the purpose of being sold.

Int. 6. What was paid for these shares by Mr. Swift, and how was the payment made?

Ans. Just the price I don't remember. I remember there was a check for ten thousand dollars on the bank here, and the balance was in four notes, two of two years, and two of three years, each for $20,334.60.

Int. 7. What was done with the check for ten thousand dollars and its proceeds?

Ans. I saw the cash, and five thousand dollars was telegraphed to Chicago, I believe to Charles A. Gregory.

Int. 8. What do you mean by "telegraphed to Chicago"?

Ans. Five thousand dollars was deposited in a bank here in Boston to Charles A. Gregory's credit, and he was so notified by telegraph. It was about five thousand dollars; it may have been a little more or a little less.

Int. 9. What was done with the remainder of the proceeds of the check for ten thousand dollars?

Ans. It was held by Mr. Butterfield.

Int. 10. All of it?

Ans. With the exception of five hundred dollars, which I received myself.

Int. 11. Did Mr. Butterfield give any receipt for the four thousand five hundred dollars which he held? If so, what was this receipt, to whom was it given, and where is it now?

Ans. It was given in New York to myself. He gave me a

receipt for four thousand five hundred dollars, to be paid me on my arrival in London. I have the receipt in my possession, but not with me here.

Int. 12. Will you please produce it as soon as you can, and send it to the examiner, in order that it may be annexed to your deposition, and form a part of it?

Ans. I will.

Int. 13. Was this money ever paid to you by Mr. Butterfield or any part of it, — this four thousand five hundred dollars?

Ans. No.

Int. 14. What was done with the four notes for $20,334.60 each?

Ans. They were left in Mr. Butterfield's hands.

Int. 15. Was he given any authority with regard to them, and, if so, what and by whom?

Ans. The notes were payable to George W. Butterfield. He was given authority by me to raise ten thousand dollars on the two-year note. Two of the notes belonged to Mr. Gregory and two to myself. We each had one for two years and one for three years. Mr. Gregory gave authority to Mr. Butterfield to raise ten thousand dollars on his two-year note. The balance of the two-year notes was to be placed to our credits, either in money or notes, from the same party,— Mr. Swift. The two three-year notes were to be indorsed by Butterfield, and were to be given up, one to Gregory and one to me.

Int. 16. What was in fact done with these four notes by Butterfield?

Ans. He gave them to Charles F. Jones, who exchanged them, without authority from us, for five other notes of Mr. Swift, two negotiable notes, one for ten thousand and the other for fifteen thousand dollars, and three non-negotiable notes payable to Charles F. Jones, two for $20,334.60 each and one for $15,000.

Int. 17. What was done with these two negotiable and three non-negotiable notes now, so far as you know, and where are the non-negotiable notes now, so far as you know?

Ans. I understand the negotiable notes were negotiated through

Mr. Jones and Mr. Williams. Of the non-negotiable notes, one for $20,334.60 I have in my possession; the other two were placed in the hands of Mr. Pike.

[Mr. TALBOT *objects to the answer as not within the personal knowledge of the witness.*]

I will add that F. A. Pike told me that he had the notes, in New York, at the Fifth Avenue Hotel. I saw him at the Fifth Avenue Hotel.

Int. 18. When was it that you saw Mr. Pike at the Fifth Avenue Hotel?

Ans. I think in September, 1883.

Int. 19. Was that the first that you knew of Mr. Pike's having these notes?

Ans. No.

Int. 20. What did you know about it before, and when?

Ans. In July, 1883, I was told by Butterfield and Jones that the notes had been deposited with Pike, for $25,000.

Int. 21. Do you know what became of the proceeds of the negotiable notes that were negotiated through Mr. Jones and Mr. Williams? If you know, tell all you know about it.

Ans. All I can say is, it was used for the benefit of the May Lundy enterprise, as far as I know.

Int. 22. Did Jones have authority to use the proceeds of these notes for the benefit of the May Lundy enterprise, and, if so, to what extent?

Ans. Yes; he had authority on two notes, one belonging to Gregory and one belonging to myself. I mean Jones and Butterfield had authority to raise ten thousand dollars on each of these notes; I mean ten thousand dollars on Gregory's note and ten thousand dollars on my note.

Int. 23. How did you get the non-negotiable note for $20,334.60 which you say you have in your possession?

Ans. It was given to me by Charles F. Jones, as belonging to me, in Boston, in July, 1883.

Int. 24. What right, if any, do you claim to have in the two non-negotiable notes now in the possession of Mr. Pike?

Ans. I claim the right in the $15,000 note to $7,500, or one half.

Int. 25. Have you any written acknowledgment from Mr. Gregory in regard to this $15,000 note? If so, please produce it, if you have it here.

Ans. I have, and I produce it.

Int. 26. By whom is it signed, and in whose handwriting is it?

Ans. It is signed by Charles A. Gregory, and the whole instrument is in his handwriting.

Int. 27. Was it written and signed by him in your presence?

Ans. Yes, sir.

Int. 28. Please read it and then hand it to the examiner to be annexed to your deposition.

Ans. It read as follows: —

LONDON, Jan'y 2, 1884.

I have an order on F. A. Pike for a certain note made by W. C. N. Swift of New Bedford, Mass., for $15,000 placed with said Pike by Geo. W. Butterfield. This note belongs partly to me and partly to J. C. Kemp van Ee; if I get this note I will hold it or its proceeds for the account of said Kemp & myself in the proportion in which each of us may be entitled to the same, and I am to raise money on the same for our joint benefit.

CHARLES A. GREGORY.

I now hand it to the examiner to be annexed.

[*Paper handed to the examiner, is marked "Exhibit Gregory Acknowledgment, J. G. S., Ex'r."*]

Int. 29. At the time this instrument was signed by Mr. Gregory, did you have any conversation with him as to the respective amounts which you and he were entitled to out of this $15,000 note; and, if so, what was the conversation?

Ans. We did have a conversation at that time. The conversation was as follows: That he would sail for America, and try to negotiate this note of $15,000, and would send me one half of the amount.

Int. 30. Did that conversation take place on the day of the date of this instrument, Jan. 2, 1884?

Ans. Yes, sir.

Int. 31. Had you previously claimed a larger amount than half of this note, and, if so, how much, and on what grounds?

Ans. Yes, I had. I claimed fourteen thousand five hundred dollars. I had given Mr. Butterfield only authority to raise ten thousand dollars, and he also held the four thousand five hundred dollars that was due me from the first payment by Mr. Swift. By an agreement with Mr. Gregory, I consented to take half of the $15,000 note.

Int. 32. How much did you claim from Mr. Gregory on this $15,000 note before you made this agreement with him to take only one half of it?

Ans. My claim direct was ten thousand dollars.

Int. 33. Why did you claim ten thousand dollars?

Ans. Seven thousand five hundred of the fifteen thousand dollar note, and two thousand five hundred in money owed to me by Butterfield and Jones; as Butterfield and Jones had received four thousand five hundred of the money belonging to me from the first payment of ten thousand dollars from Mr. Swift, whereas Mr. Gregory had his five thousand of this payment in cash.

Int. 34. Do I understand you to say that you first claimed that $10,000 of this $15,000 note belonged to you, and only $5,000 of it to Mr. Gregory, but that you afterwards agreed with him to divide the amount of the note equally between you, and that this agreement was in force when Mr. Gregory signed this acknowledgment of Jan. 2, 1884? Is this correct?

[*Objected to by* Mr. TALBOT *as leading.*]

Ans. Yes, sir.

Int. 35. What was the consideration for your giving up your claim to two thirds of this note and taking one half instead? Why did you do this?

Ans. There was no consideration. It was to have peace and quietness in the family. It was for peace and good feeling.

Int. 36. Have you had any further agreement with Mr. Gregory with regard to this matter since; I mean, with regard to your respective shares of this $15,000 note?

Ans. I have had letters referring to it, but nothing more.

Int. 37. Has that agreement between you been changed from that time to the present, or does it still remain in force between you?

Ans. It still remains in force; it has not been changed.

Int. 38. In your answer to Int. 15, you stated that Butterfield was given authority by you to raise $10,000 on the two-year non-negotiable note belonging to you, and was given a similar authority by Mr. Gregory to raise $10,000 on the two-year non-negotiable note belonging to him. To what were these two amounts of $10,000 each to be applied by Butterfield?

Ans. For one-eighth interest in the May Lundy group of mines sold to me for $10,000, and one-eighth interest in the same mines sold to Mr. Gregory for the same amount, $10,000.

Int. 39. Was there a written contract in regard to this?

Ans. Yes, sir.

Int. 40. Have you it here, and will you please produce it to be annexed to your deposition?

Ans. Yes, I have it here, and now produce it.

Int. 41. In whose writing is this contract, and by whom is it signed, and was it signed in your presence by all the parties to it?

Ans. It is in Charles F. Jones's writing. It is signed by G. W. Butterfield, Charles F. Jones and myself. I was present when the other two signed.

Int. 42. I see that your name is signed to this instrument "J. C. Kemp," instead of J. C. Kemp van Eé; why did you sign so?

Ans. The instrument was made out that way, and I didn't have time to change it. I sometimes signed my name that way in this country, but always used the "van Eé" in Europe.

Int. 43. I see that this instrument is dated in 1883, but the day and the month are not filled in. Do you remember when it was in fact executed? If you do not remember exactly, state as near as you can.

Ans. I do remember exactly; it was on April 7, 1883, at Young's Hotel in Boston. I now hand this agreement to the examiner to be annexed to my deposition.

[*Agreement handed the examiner is marked "Exhibit Agreement of April 7, 1883, J. G. S., Ex'r."*]

Int. 44. In answer to Int. 10, you stated that you were told by Butterfield and Jones that the notes had been deposited with Pike for $25,000; what time in July was this?

Ans. About the 24th of July, 1883. It was before Butterfield and Jones went to Calais to see Mr. Pike.

Int. 45. State the conversation in detail. State what was said to you by Butterfield and Jones and what you said to them. State as fully as you can.

Ans. On my arrival in New York from London, between the 18th and 20th of July, 1883, I met Mr. Jones at the Hoffman House. I asked him about my notes. He then told me he had them in Boston; that if I would go with him to Boston, he would turn over the notes to me. About the 22d of July, we, Jones and myself, arrived in Boston. Then about the 24th or 23d, I won't be positive as to dates, we met Mr. Butterfield at the Quincy House. I then demanded my notes from Mr. Jones and Butterfield. They then told me they had them pledged to Mr. Pike. (This is the statement I referred to in my answer to Int. 20.) We then had a few words, and I demanded my notes. After Mr. Jones and Mr. Butterfield consulted together, Mr. Jones took me to Mr. Williams's and gave me one note for $20,334.60. I then demanded my $10,000 note, also, Mr. Jones stating at the time, that it was a $15,000 note and that $5,000 of it belonged to Charles A. Gregory, and he could not give it to me; but he would see Mr. Swift and have the note so cut up that he could give me $10,000, and hold the other $5,000 for Gregory. That settled that whole transaction, and it was perfectly satisfactory at that time. I was promised this thing in two or three days; just as soon as he could get time to go down and see Mr. Swift.

Int. 46. Did you see at that time, at Mr. Williams's office, the $15,000 note, and did you see any other note besides the one that was given to you, and, if so, what?

Ans. I saw three notes, one for $20,334.60, which was given to me, and another note for the same amount, and another note the amount of which I did not see. I saw the three notes in Mr. Jones's hands. The last two notes I never saw again.

Int. 47. Did you ever receive the $10,000 note which was promised you by Mr. Jones, or hear anything more in regard to it?

Ans. No, sir, I never received such a note. I was told by Mr.

Jones and Butterfield, in the early part of August of the same year, that my note of $10,000 was not pledged to Mr. Pike.

Int. 48. At the time of the conversation which you have stated as taking place on or about July 23 or 24, in 1883, was anything said in regard to the pledging to Mr. Pike of the note for $15,000? If so, by whom was it said and what was said?

Ans. Yes, sir, there was. It was said by Mr. Jones. He said that he had pledged the three notes to Mr. Pike; this turned out not to be so, as I got my note later on and saw the others. I forbade him to use any portion of my notes. That was before I had any of the notes.

Int. 49. When did you first learn that this $15,000 note in which you claim an interest had been delivered to Mr. Pike?

Ans. On my return from California in October, 1883.

Int. 50. Have you ever assented to or agreed in any way to the possession of that note by Mr. Pike?

Ans. No, sir.

Int. 51. Will you please examine Exhibit A annexed to the answer of Frederic A. Pike in this case, printed on page 13 of the printed record, purporting to be a copy of a document addressed to F. A. Pike and signed by you and Mr. Gregory, and then state whether such a document was executed by Mr. Gregory and yourself; and, if so, what was done with it?

Ans. There was a document something like this, — I don't remember the exact words, — signed by myself and Mr. Gregory; I saw Mr. Gregory sign it, and Mr. Gregory was to send it to America.

Int. 52. Should you say that Exhibit A is a true copy of the document, so far as you remember?

Ans. I don't remember. I remember there was such a document signed, but I can't say whether that is a true copy or not.

Int. 53. Do you remember whether the document you signed was dated on or about Dec. 11, 1883?

Ans. I remember such a document was signed by Mr. Gregory and myself in December, 1883.

Int. 54. Will you please examine the answers to Ints. 19 and 20 in the deposition of William C. N. Swift, upon pages 94 and 95 of

the printed record in this case, and state whether the documents testified to by Mr. Swift were signed by you and sent by you to him?

Ans. They were.

Int. 55. Have you employed any counsel in Boston to represent you; and, if so, whom?

Ans. I have employed William F. Wharton, Esq., who was retained for me by Mr. Swift at my request, and I have since consulted with him myself.

Int. 56. Did you have a conversation with Mr. Charles F. Jones in Boston, in July, 1884, in regard to the renewal of the notes given by Mr. Swift?

Ans. I did not have such a conversation in July, 1884, but I did in July, 1883.

Int. 57. Then the date as printed on page 95 of the record in the last paragraph of the letter printed at the bottom of that page should be July, 1883, and not July, 1884, should it?

Ans. Yes, sir, 1883.

Int. 58. Are the papers that I now hand you the originals of the documents printed on pages 94 and 95 of the record, and are they signed by you?

Ans. Yes, they are the originals of the documents, and they are both signed by me.

Int. 59. I see that on the original of the letter dated April 11, 1885, the date July, 1883, has been changed to July, 1884; which should it be?

Ans. It should be 1883, and not 1884.

Int. 60. Please hand these two documents to the examiner to be annexed to your deposition.

Ans. I hand them as requested.

[*The documents are marked respectively "Exhibit Kemp van Ee Letter, April* 10, 1885, *J. G. S., Ex'r," and "Exhibit Kemp van Ee Letter, April* 11, 1885, *J. G. S., Ex'r.*"]

Int. 61. Did this conversation with regard to the extension of the notes, which you say you had with Mr. Jones in July, 1883, take place at any of the interviews with him that you have already mentioned?

Ans. It did.

Int. 62. At which interview?

Ans. It was in everyday conversation, from the time I met him till I left him.

Int. 63. Please state what this conversation was that you had with him with regard to the extension of these notes. State exactly what he said, so far as you remember.

Ans. It was in our conversation when I was trying to get the notes. He said he could not part with any of the notes; that he had given Mr. Swift his word and honor that he would not part with them, and that he had further agreed to extend the notes; he said he did this because Mr. Swift had given him two short notes on four and six months. This was our first conversation on the subject.

A day or two later I again asked him for my notes. He then stated it was no use talking about getting the notes, as his promises held good to Mr. Swift, but if I would not negotiate the notes, he would give them up, and I had to agree to wait another year. I promised to do so to him.

Int. 64. Was it before or after this conversation that he told you he could not give up the notes because they had been pledged to Mr. Pike?

Ans. It was about the same time.

Int. 65. Did he at different times give both these reasons for not giving up the notes?

Ans. Yes, sir.

Int. 66. Did you see Mr. Jones in London, in April of this year, 1885?

Ans. Yes, sir.

Int. 67. Did you give him any notice at that time in regard to Mr. Swift's desiring an extension of the $15,000 note?

Ans. Yes, sir.

Int. 68. What notice did you give him in regard to the extension?

Ans. I notified him that Mr. Swift desired an extension of one year.

Int. 69. Was this notice given by you at the request of Mr. Swift?

Ans. Yes, sir.

Cross Examination by THOMAS H. TALBOT, Esq., *of Counsel for Defendant Pike.*

Cross-Int. 70. You have, in your direct testimony, stated the sale of shares of the Sierra Consolidated Mining Co., owned by you, was made by Butterfield, with your authority, to the defendant Swift; what was your object in having that sale effected by Butterfield?

Ans. I needed money.

Cross-Int. 71. What led you to employ Butterfield to effect the sale?

Ans. I was ill, and thought he could do it better.

Cross-Int. 72. Had there been any conversation between you and Butterfield as to the use of the money or credits to be obtained from this sale?

Ans. Yes, sir.

Cross-Int. 73. Please state fully what that conversation was.

Ans. I was to pay him $10,000 for one eighth of all profits derived from the sale of the May Lundy group of mines.

Cross-Int. 74. Did you know at that time what title Butterfield had to the May Lundy mines?

Ans. I did not.

Cross-Int. 75. Did you know nothing about it whatever?

Ans. Nothing whatever.

Cross-Int. 76. Look at the paper now shown you, and state if it is the original of which a copy is printed on page 13 of the record, and if the said printed copy corresponds with the original.

Ans. It is. It was signed by myself and Mr. Gregory in my presence. The copy, as printed on said page 13, is a true copy.

Cross-Int. 77. Can you annex this original to your deposition? If you cannot, state why not.

Ans. I cannot, because it is in the custody of the clerk of the Supreme Judicial Court of Massachusetts, attached to the answer filed in this case when in that court, and has been brought here by the assistant clerk of said court, who is about to take it away with him to return it to the files of said court.

Cross-Int. 78. When you paid or contributed $10,000 for one eighth of the profits of this enterprise, did you know nothing at all about the ownership of the mines from which you were to reap this profit?

Ans. Yes, sir, I did.

Cross-Int. 79. What did you know?

Ans. I was told they were to pay Mr. Pike $250,000 for the May Lundy, Lake View and Lucky Morton mines, on or before July, 1883. I am not positive about the date, but they had a stipulated time to do it in.

Cross-Int. 80. Was the expiration of this contract with Mr. Pike talked over in the interviews which you have stated as taking place in July, 1883, between you and Jones and Butterfield?

Ans. Yes, sir.

Cross-Int. 81. Was the expiration of this contract, without being executed on the part of Butterfield and Jones, understood to be probable and almost certain in these conversations?

[*Objected to and withdrawn.*]

Cross-Int. 82. Please state what was said in those conversations about this expiration as likely or not likely to take place.

Ans. Our conversation was this: That Mr. Butterfield had a claim of $180,000 against Mr. Pike, and that if he didn't extend the time he would attach the mine.

Cross-Int. 83. Was that all that was said?

Ans. He was backed up by Mr. Jones.

Cross-Int. 84. Is what you have stated in answer to Cross-Ints. 82 and 83 all that was said about the expiration?

Ans. All I can remember.

Cross-Int. 85. Where did you go after the execution of the contract of April 7, 1883, which you have testified about?

Ans. I went to New York, and from New York to London.

Cross-Int. 86. When did you go to London, and for what purpose?

Ans. About the 10th of April, to assist in helping to sell the group of May Lundy mines.

Cross-Int. 87. Whom did you go with?

Ans. George W. Butterfield, Charles A. Gregory and Mr. Moyle, a mining expert.

Cross-Int. 88. When did you leave London on your return?

Ans. About the 7th of July.

Cross-Int. 89. In your conversation in London with Butterfield and Gregory before you left, was anything said to the effect that the contract then subsisting with Pike was likely to expire?

Ans. Yes, sir.

Cross-Int. 90. Where and when were you told that the Swift notes, or two of them at least, had been put up with Pike to secure the payment of the sum of $25,000?

Ans. In Boston, in July, 1883, between the 20th and 24th, or near that.

Cross-Int. 91. When and where were you told by Pike that he had the notes?

Ans. I think in October, in New York, at the Fifth Avenue Hotel.

Cross-Int. 92. In the conversation between you and Butterfield and Jones of July, 1883, was anything said about their going to Calais to negotiate with Pike?

Ans. They told me Pike had telegraphed for them to come there, and that they were going.

Cross-Int. 93. Did they say they were going to procure an extension of time within which they could purchase the May Lundy mines, or to negotiate therefor?

Ans. Not that I remember at that time.

Cross-Int. 94. What did you understand they were going for?

Ans. I was not consulted, nor did I know.

Cross-Int. 95. Did you have no intelligence whatever about the purpose of their visit to Calais?

Ans. Not at that time.

Cross-Int. 96. Was nothing said before you left London about procuring such an extension?

Ans. No, sir.

Cross-Int. 97. Where did you first meet Butterfield on his return from London in July, 1883?

Ans. In Boston.

Cross-Int. 98. What did Butterfield say in London, if anything, about obtaining the means of fulfilling his then subsisting contract with Pike?

Ans. He said that the New England Trust Company in Boston would advance the money to pay Pike.

Cross-Int. 99. When you met him in Boston, did you ask him anything about this?

Ans. Yes, sir; on his return in July.

Cross-Int. 100. What was the conversation between you in this relation?

Ans. He told me that the president had said money was very scarce, and he couldn't do it.

Cross-Int. 101. Did you see Butterfield and Jones, or either of them, on their return from Calais?

Ans. Yes, sir.

Cross-Int. 102. When and where?

Ans. I met Mr. Jones in New York near the 1st of August.

Cross-Int. 103. What did he tell you, if anything, about the extension of the time of this purchase?

Ans. He said everything was all right.

Cross-Int. 104. What did you understand him to mean by that?

Ans. I supposed that the May Lundy was all right. I had no other business with him at that time.

Cross-Int. 105. How much did you see him in New York at that time?

Ans. I saw him only once. He was then starting either for Boston or London.

Cross-Int. 106. What was said between you, if anything, about the Swift notes?

Ans. I don't remember anything at all at that time.

Cross-Int. 107. Where did you go next after that?

Ans. To San Francisco.

Cross-Int. 108. For what purpose?

Ans. To get two mines called the Jim Fiske and the Josie Mansfield.

Cross-Int. 109. What were you going to do with these, if you got them?

Ans. Deed them to Jones and Butterfield, according to contract.

Cross-Int. 110. In general what were the terms of that contract? What was to be your consideration for deeding these mines?

Ans. That of the May Lundy was not sold at the stipulated time in bond from Pike to Butterfield; I was to have one eighth of the Howk, Gilchrist & Carpenter properties, and these were to go in with those.

Cross-Int. 111. If the May Lundy mine was sold within the stipulated time, what were you to have?

Ans. One eighth of the entire profits.

Cross-Int. 112. Do you now state that you did not know in August, 1883, whether or not the time had been extended for the purchase of this mine from Pike?

Ans. I don't state that.

Cross-Int. 113. When did you first learn the fact, — fact of this extension?

Ans. I inferred it from Jones's statement in New York, that it was all right.

Cross-Int. 114. Did you ask any questions about the manner in which that extension had been obtained?

Ans. I did, but got no satisfaction.

Cross-Int. 115. Will you give your questions and the answers to them as near as you can?

Ans. All I can say, I was ignored on the whole proposition.

Cross-Int. 116. Will you be good enough to give the questions you put in this matter?

Ans. I don't remember any.

Cross-Int. 117. Do you not remember any of those questions to which you say answers were refused?

Ans. No, sir, I do not.

Cross-Int. 118. Did you go to California after July 31, 1883, on any business connected with the May Lundy mines, and when?

Ans. The May Lundy group of mines, — yes, sir, I think in August, 1883.

Cross-Int. 119. What was this business?

Ans. To fix up the Josie Mansfield and the Jim Fiske.

Cross-Int. 120. Did you later go to California on business in

connection with the May Lundy mine? If so, when and what was that business?

Ans. I came from California to New York about September or October, and took Mr. Walker back to California to the May Lundy mine for an examination. He was one of the directors of the May Lundy Company, Limited, in England, who came over to inspect the property.

Cross-Int. 121. When did you return from that visit to California?

Ans. The latter part of November, I think.

Cross-Int. 122. How soon after your return did you leave for London?

Ans. In about two weeks.

Cross-Int. 123. What knowledge had you of the report which Walker was to make with regard to that property, when you left?

Ans. I don't think that has anything to do with this case.

Cross-Int. 124. When did you first learn that Walker's report was to be or was unfavorable to the sale of this property, as it was then endeavored to be made in England?

[*Objected to as assuming as facts matters not in evidence, and as immaterial.*]

Ans. I refuse to answer that question.

Cross-Int. 125. What was Walker's report in that relation? What was Walker's general report?

[*Objected to as immaterial.*]

Ans. I refuse to answer.

Cross-Int. 126. What was your purpose in going to England in November, 1883?

Ans. Private business.

Cross-Int. 127. Was it in connection with the May Lundy enterprise, in any way?

Ans. Yes, some.

Cross-Int. 128. Will you state how much and what?

Ans. I can only state that I thought the May Lundy was going to be a sale; that is all.

Cross-Int. 129. When did you change your mind on that point?

Ans. About February, 1884.

Cross-Int. 130. Did you not change your mind any earlier than that?

Ans. No, sir.

Cross-Int. 131. You stated that the concession that you made to Gregory of a portion of your claim which led to his acknowledgment of Jan. 2, 1884, was made on your part for the purpose of keeping peace in the family; of whom did that family consist?

Ans. George W. Butterfield, C. F. Jones, Charles A. Gregory and myself.

Cross-Int. 132. Was there any correspondence between you and Gregory after your conversations with Butterfield and Jones in July, 1883, before you saw him, Gregory, in London, in November, 1883?

Ans. I am not positive about it. I don't know whether there was or not.

Cross-Int. 133. As I recollect some expressions of yours with regard to conversations with Jones, you knew that a change had been effected with Mr. Swift with regard to these notes. Am I right as to that?

Ans. Yes, sir.

Cross-Int. 134. Did you talk with Gregory in London about this matter of the change in the notes?

Ans. On my return to London, in November, I did.

Cross-Int. 135. How soon after you reached London?

Ans. I think the very morning, certainly shortly afterwards.

Cross-Int. 136. When did Walker reach London?

Ans. A few days before I did.

Direct Examination resumed.

Int. 137. Are you about to sail for Europe; and, if so, by what steamer?

Ans. Yes, by the Umbria, at four o'clock, Saturday morning.

Int. 138. When are you obliged to be on board?

Ans. At eleven o'clock Friday night.

Int. 139. Where does she sail from?

Ans. New York City.

Int. 140. When are you going to New York?

Ans. This evening at half past ten.

Int. 141. What time is it now?

Ans. A quarter past six.

Int. 142. Have you been engaged in having your deposition taken since ten o'clock this morning, except during one hour for lunch?

Ans. Yes, sir.

Int. 143. Are you obliged to go to New York tonight; and, if so, why?

Ans. I have business there that it is absolutely necessary for me to attend to before sailing for Europe.

Int. 144. Where are you going to in Europe, and when do you expect to return to this country.

Ans. To London, England, and expect to return to this country in April or May, 1886.

J. C. KEMP VAN EÉ.

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 12.

DEPOSITION OF WILLIAM C. N. SWIFT.

Direct Examination by HENRY W. SWIFT, Esq., *of Counsel for the Defendant Swift.*

BOSTON, Oct. 29, 1885.

Int. 1. Please state your name, age, residence, and occupation, and if you are one of the defendants in this case.

Ans. William C. N. Swift; seventy; Dartmouth, Mass.; merchant; I am.

Int. 2. Were you present when the deposition of William H. Aiken in this case was taken on Oct. 27, and did you hear his testimony?

Ans. I was present and did hear it.

Int. 3. Did he correctly describe the transaction of the exchange of notes that took place between you and Charles F. Jones on April 20, 1883?

Ans. He did.

Int. 4. Have you the four cancelled notes which were then given up by you? If so, will you please describe them, and read the indorsements on them, and please state in whose handwriting the indorsements are?

[*Objected to by* Mr. Brooks, *unless the notes are produced and put in evidence.*]

Ans. I have them here. They are four notes, dated New Bedford, 4 mo. 4th, 1883, each for $20,334.60, two at two years and two at three years after date. My signature on each of them is cancelled, and they are each marked "Paid" across the face.

On two of them is indorsed, "Pay to order of C. F. Jones," signed "G. W. Butterfield," and the two others are indorsed, "Pay to the order of C. F. Jones, G. W. Butterfield." These indorsements are in the handwriting of G. W. Butterfield, I believe.

Then one of these three years' notes is indorsed, "Pay to the order of G. W. Butterfield, Charles F. Jones"; then follows on the same note, "Pay to the order of C. F. Jones, George W. Butterfield."

Then follows on all the notes this indorsement: "Boston, Apr. 20, 1883, Received payment for within note and interest," all of them signed "Charles F. Jones."

The words, "Received payment for within note and interest," on all the notes, are in the handwriting of William H. Aiken, and all these receipts are signed "Charles F. Jones" and the signatures are in his handwriting, and I saw him write them.

Int. 5. On the three years' note which contains the double indorsement, you have not yet stated in whose handwritings are the second and third indorsements: will you now please state, if you know, in whose handwritings they are?

[*Objected to, because the question calls for the statement of the witness as to the handwriting of an instrument which is not produced in evidence, and which, as complainant understands, the witness declines to put in evidence, and by so doing is undertaking to offer parol evidence of what is a written instrument or a part thereof.*]

Ans. The second indorsement, "Pay to the order of G. W. Butterfield, Charles F. Jones," I think is in Charles F. Jones's writing.

The third indorsement, "Pay to order of C. F. Jones, Geo. W.

Butterfield," I think is in Mr. Butterfield's handwriting; I have no doubt of it.

Int. 6. Are you familiar with the handwriting of George W. Butterfield and with the handwriting of Charles F. Jones?

Ans. I am, with both.

Int. 7. Will you please produce these four notes, in order that they may be inspected by the counsel who are present and returned to you, and will you please furnish copies of them to the examiner, to be by him attested as true copies, to be annexed to your deposition?

Ans. I produce them for inspection as requested, but I wish them returned to me as vouchers. I will furnish copies as requested.

[*Counsel for plaintiff declines to inspect the notes upon the terms upon which such inspection is offered, to wit, that the notes must after inspection be returned to the witness, and not put in evidence in the cause; and said counsel also objects to any copies of said notes being put in evidence in lieu or in place of the original notes.*

Copies furnished by the witness and attested by the examiner are offered in evidence and marked respectively "Exhibit Swift Note No. 1, J. G. S., Ex'r," "Exhibit Swift Note No. 2, J. G. S., Ex'r," "Exhibit Swift Note No. 3, J. G. S., Ex'r," and "Exhibit Swift Note No. 4, J. G. S., Ex'r."]

Int. 8. In exchange for these four notes, you gave to Mr. Jones five notes, two negotiable and three non-negotiable, as described by Mr. Aiken, did you not?

Ans. I did.

Int. 9. Did you give any one of these five notes in exchange for any particular one of the four notes or for any part of any particular one of the four notes, or were the four notes as a whole exchanged for the five notes as a whole?

Ans. I did not; the five notes as a whole were exchanged for the four notes as a whole.

Int. 10. The four notes then surrendered had been given for the purchase of certain mining shares, had they not?

Ans. They had.

Int. 11. How many shares were there, or about how many, and from whom did you purchase them?

Ans. As I remember, there were about sixteen thousand shares. They were purchased from G. W. Butterfield.

Int. 12. Do you know this document, which is attested by William H. Aiken as a witness, and with regard to which he testified in his deposition?

Ans. Yes. It is the agreement of Charles F. Jones not to part with my three non-negotiable notes given to him April 20, 1883. It is the same agreement with regard to which Mr. Aiken testified.

Int. 13. Did you give Mr. Pike, who is one of the defendants in this case, any notice of this agreement, and, if so, when did you give it, and what was the occasion of your giving such notice?

Ans. I did give Mr. Pike such notice; and to show the transaction, I will read a copy of a letter which I wrote to Mr. Pike, Sept. 8, 1883, in reply to a letter from him informing me that he had two notes, one of $15,000 and one of $20,334.60, payable to Charles F. Jones, the two notes in regard to which this suit is brought.

My letter to Mr. Pike was as follows: —

New Bedford, September 8, 1883.

F. A. Pike, Esquire, *Calais, Maine.*

Dear Sir, — Your letter dated July 31, and mailed Sept. 1, has been received.

The notes you mention are not negotiable or transferable, and I can only acknowledge Mr. Jones as payee.

Mr. Jones made a written agreement with me as follows: "I will not negotiate (the notes you refer to), made payable to me, or sell or transfer my right or interest in them, provided I can do so to any person or persons, but will keep them in my possession until they mature."

Yours truly, W. C. N. Swift.

Int. 14. Did you afterward know of these two notes being offered for sale in New Bedford, and if so, by whom?

Ans. I did. They were offered by H. M. Knowlton, of New Bedford.

Int. 15. Do you know for whom Mr. Knowlton was acting in offering them for sale? If so, please state.

Ans. He stated that he offered them on account of Mr. Pike.

Int. 16. At your interview with Mr. Jones at the time of the

exchange of the notes, was there any conversation in regard to extending the non-negotiable notes when they became due, and, if so, what was it?

[*Objected to by* Mr. Brooks, *as offering to qualify a written instrument by parol evidence.*]

Ans. There was. Mr. Jones stated that if not convenient to me to pay the notes at maturity, he would extend them for a year.

Int. 17. Did you ever give him any notice in regard to any of these notes that it was not or would not be convenient for you to pay them at maturity? If so, when, as near as you can remember?

[*Objected to by* Mr. Brooks *as leading; also because the question calls for more than the witness is supposed to know, unless the notice referred to in the question was a personal one.*]

Ans. I sent him notice by Mr. Kemp van Eé in regard to the $15,000 note about the middle of April, 1885.

Int. 18. Do you know whether Mr. Jones received this notice before the $15,000 note fell due, that is, before April 20, 1885, and if so, how do you know it?

[*Objected to, unless the witness knows of his own knowledge that Jones got the notice referred to before April* 20, 1885.]

Ans. I know it from Mr. Jones himself after his arrival in this country.

Int. 19. Have you ever received any notice from Mr. J. C. Kemp van Eé in regard to either of the notes in regard to which this suit is brought, and, if so, state what the notice was and when you received it?

[*Objected to as immaterial.*]

Ans. I received from Mr. Kemp van Eé a notice in the early part of April, 1885. The notice is as follows: —

New York, April 10, 1885.

Wm. C. N. Swift, Esq., *New Bedford, Mass.*

Dear Sir, — I have been informed that a suit in equity has been brought in one of the Massachusetts Courts by Charles A. Gregory, in which he claims to be entitled to the proceeds of a note for $15,000, executed by you under date of April 20, 1883, and payable to Charles F. Jones on April 23, 1885, and that the said note has been pledged or attempted to be pledged by George W. Butterfield or Charles F. Jones or both of them to Francis A. Pike.

You are hereby notified that I claim to be the owner of one half interest in said note, and I enjoin you not to pay to Charles A. Gregory or to any other person without my further order the proportion of either the principal or accrued interest on the said note which belongs to me.

I further authorize you to cause me to be made a party to the said suit in equity, if, in your opinion, it is necessary or advisable to do so for the protection of my interest in the said note, and to employ counsel to act in my behalf for that purpose.

I further authorize you to employ counsel and take any action that may be necessary to recover for me, by suit or other proceeding at law or in equity, my share of the proceeds of said note, and to recover in addition thereto the sum of eight hundred dollars which is due and owing to me by the said Charles A. Gregory for moneys loaned to him.

Very respectfully yours,

J. C. Kemp van Ee.

Int. 20. Did you receive any other communication from Mr. Kemp van Eé at about the same time in regard to the same matter, and, if so, what was it?

[*Objected to.*]

Ans. I received another letter from Mr. Kemp van Eé, dated April 11, 1885, as follows: —

New York, April 11th, 1885.

William C. N. Swift, Esq., *New Bedford, Mass.*

Dear Sir, — Since writing to you this morning, I beg leave to state that I have cabled to London for the contract papers between George W. Butterfield and Chas. F. Jones and myself; also an agreement whereby Charles A. Gregory of Chicago, Illinois, agrees to give me one half of the fifteen thousand dollar note, and also by letters from him that he will do everything in his power to protect my interests, and whereby he agrees to divide the fifteen thousand dollars in equal shares with me.

I will also state that Charles F. Jones stated to me in Boston in July, 1884, that he had agreed with you to renew the notes for one year. As I am obliged to leave for London today, at two o'clock, I will on my arrival in London have Mr. Jones verify the statement by cable.

Yours truly,

J. C. Kemp van Ee.

Int. 21. Did Mr. Kemp van Eé afterward send you anything further with regard to his claim, and, if so, what?

[*Objected to by* Mr. BROOKS *as immaterial.*]

Ans. He did. He sent me certain documents, among others the following: —

[Mr. BROOKS *here objects to any further answer, unless the documents are put in evidence.*

Witness continues:]

I have here both the original and a copy, and I hand the copy to the examiner.

[*Counsel for Mr. Swift states to the examiner that he does not desire to have the copy annexed to the deposition, and the examiner returns the copy to the witness.*]

Int. 22. Will you please state what the document was to which you referred in your answer to the previous question and by whom it purports to be signed?

[*Objected to by* Mr. BROOKS *as an attempt to prove a written instrument by parol evidence.*]

Ans. It was a document relating to the ownership of the note of $15,000, now in suit, and was signed by Charles A. Gregory.

Int. 23. Please state more fully what this document was.

[*Same objection.*]

Ans. I will read it: —

LONDON, Jan. 2, 1884.

I have an order on F. A. Pike for a certain note made by W. C. N. Swift, of New Bedford, Mass., for $15,000, placed with the said Pike by George W. Butterfield; this note belongs partly to me, and partly to J. C. Kemp van Eé. If I get this note I will hold it or (twice) its proceeds for the account of said Kemp and myself in the proportion in which each of us may be entitled to the same; and I am to raise money on the same for our joint benefit.

CHARLES A. GREGORY.

Int. 24. Do you know Mr. Kemp van Eé's residence? If so, what is it? And do you know where he is now?

Ans. I can't state positively, but I think his residence is in San Francisco. I think now he is in Mexico.

Int. 25. Do you know when he is expected to return from

Mexico, and if he is expected to come to Boston, and, if so, when? If so, state it.

Ans. He has written me that he expected to leave Mexico in November, and I have reason to believe that he will come to Boston.

Int. 26. In the notice of Mr. Kemp van Eé to yourself to which you have testified, he authorizes you to employ counsel. Have you done so, and, if so, whom have you employed for him?

Ans. William F. Wharton, of Boston; I have employed him as counsel for Mr. Kemp.

Int. 27. Have you had any notice of any claim of George W. Butterfield in regard to the notes in question in this suit? And, if so, when did you have such notice and how did he give it to you?

[*Objected to as irrelevant.*]

Ans. I have had such notice. I met him in San Francisco in the early part of August, of this year. He told me he had heard of Mr. Pike's and Mr. Gregory's attaching my property for the payment of the $15,000 note; that that note and the other note for $20,000 did not belong to either Mr. Pike or Mr. Gregory, but they belonged to him and he could prove it; that he would send me some documents in relation thereto. He sent me a report of a trial in the Supreme Court of Mono County, Cal., George W. Butterfield *v.* Frederick A. Pike *et al.* He sent also an order on Messrs. Shattuck and Monroe, 35 Court Street, Boston, for certain papers; but in the order was included a clause that I should pay their bill against Mr. Butterfield, and consequently I did nothing about it.

Int. 28. I understand you to say that the order for the documents on Messrs. Shattuck and Monroe was made conditional on your paying Mr. Butterfield's bill to them. Is that so?

[*Objected to by* Mr. Brooks.]

Ans. Yes, sir; it is so.

Int. 29. And therefore you did nothing about it?

Ans. I did nothing about it.

Int. 30. What you called a report is a copy of the summons and complaint in the California suit brought by Mr. Butterfield, is it not?

Ans. It is. It is so indorsed upon the document.

Int. 31. Will you produce the document and hand it to the examiner to be annexed to your deposition as a part thereof?

[*Document is offered as evidence by counsel for the defendant Swift, and marked "Exhibit California Suit, J. G. S., Ex'r." It is agreed that only such portions of this exhibit shall be printed in the record for final hearing as either party may designate.*]

Ans. I produce it, and hand it to the examiner as requested.

Int. 32. At the time Mr. Butterfield gave you notice to which you have testified in regard to his claim, did he say anything more in regard to it, or in regard to the grounds on which it was founded, than what you have already stated? If you remember anything more, please state it now.

[*Objected to as before.*]

Ans. Well, he said that Mr. Pike was not entitled to the ownership of these notes, because he hadn't complied with his agreement in relation to the deposit of papers in the Union Trust Company of New York; and as to Mr. Gregory, he had documents to prove that Mr. Gregory had no right to them. He said a great deal more, but those are the main points that I remember. Mr. Butterfield stated to me that the notes belonged to him, Butterfield.

Int. 33. What is Mr. Butterfield's residence, and where is he now, if you know?

Ans. His residence is San Francisco, Cal., and he is now, I think, in England.

Cross Examination by FRANCIS A. BROOKS, Esq., *of Counsel for Complainant.*

Cross-Int. 34. Does Jones now claim any ownership in the two notes described in this bill, or pretend to have any claim against you thereon, so far as you know?

Ans. As far as I know, he does not.

Cross-Int. 35. Where was Jones in the middle of April, 1885, when you sent notice to him of your desire that the $15,000 note should be extended? Was he not in London, and did he receive this notice before the actual maturity of that note?

Ans. He was in London, and received notice before the maturity of the note.

Cross-Int. 36. If you sent this by a messenger, Kemp, the middle of April, and the note matured April 20, what made you say he received the note before the note matured?

Ans. If I said that I sent this message the middle of April, it was incorrect. It was before the middle of April that I sent this message by Kemp.

Cross-Int. 37. Is not your statement that Jones received this message before April 20, 1885, based upon some information given you by Jones after he had returned to this country from England?

Ans. I received information from Jones after his arrival to that effect, but I also received information from other sources.

Cross-Int. 38. Did you receive information of this kind from any source prior to April 20, 1885?

Ans. I should have to look up my documents to answer this, but the maturity of the note was April 23, and I received information before that time.

Cross-Int. 39. In what way and from whom?

Ans. By telegram from Mr. Kemp van Ee.

Cross-Int. 40. To what effect?

Ans. That he had seen Jones in relation to this matter.

Cross-Int. 41. Is that all?

Ans. My recollection is not distinct about it; I think he said Jones wanted some money.

Cross-Int. 42. Did he say whether or not Jones would undertake to extend the $15,000 note?

Ans. My impression is that on payment of a certain sum of money it would be done, which was not paid.

Cross-Int. 43. When you sent this message to Jones in London, through Kemp, in April last, you knew or understood that the $15,000 note was in Pike's hands, and had been lodged with him by Butterfield or Jones, or both, and that Jones had no power or control whatever over the note, and no means of extending the payment thereof, did you not?

[*Objected to by* Mr. SWIFT, *as calling for the opinion of this witness on questions of law.*]

Ans. I know from a letter I received from Mr. Pike that he had the note, but I had no knowledge of its being collateral, and I could not have believed it to be so, knowing that Pike had offered the note for sale. I had no knowledge whatever of these parties' transactions to which the question refers, and thought at the time that I had an undoubted right to an extension of the note whether I had Jones's consent or not, for I could prove that he agreed to do it.

Cross-Int. 44. The letter referred to, written you by Pike, was dated July 31, 1883, was it not?

Ans. No doubt it was so.

Cross-Int. 45. Did not Pike, in his letter of July 31, 1883, claim to be the owner of the $15,000 note now in controversy, and did he not inform you how he came into possession thereof?

Ans. I think he did so claim. I do not remember his stating the manner in which the note came into his possession.

Cross-Int. 46. Does it make any difference to you to whom you pay either of these notes in controversy, if you pay to the rightful owner of the same, and obtain surrender of the notes themselves?

[*Objected to by* Mr. SWIFT, *as calling for the opinion of the witness on matters of law.*].

Ans. I don't know that it does.

Cross-Int. 47. You do not question or intend to deny your own liability as maker of these notes, do you?

[*Objected to as before.*]

Ans. I don't know as I shall answer that question.

Cross-Int. 48. I do not understand that any defence has been made thus far in this case by you, to the effect that you are not liable to some one on these notes. Do you understand otherwise?

[*Objected to for the same reason.*]

Ans. I understand my counsel has not taken any such ground.

Cross-Int. 49. Have you any present intention of instructing him to take any such ground, if it is not too late to do so?

[*Objected to.*]

Ans. I decline to answer.

Cross-Int. 50. I now hand you the original order, a copy of which is printed in the 13th answer in the deposition of the plaintiff Gregory (page 31 of this record), purporting to be signed by G. W. Butter-

field. Please examine the same and state whether the signature is in the handwriting of G. W. Butterfield.

Ans. I believe it is.

Cross-Int. 51. This order is dated London, Dec. 15, 1883, and recites that the $15,000 note made by yourself and dated April 20, 1883, was placed in Pike's possession by Butterfield, and was the property of the plaintiff Gregory at the time it was placed in Pike's hands, and is now the property of said Gregory. If Butterfield made this statement in his order on Pike of Dec. 15, 1883, do you think he told you the truth in California last August, when he said that this note and the other one of $20,334.60 then belonged neither to Gregory nor Pike, but to himself, Butterfield?

[*Objected to by* Mr. SWIFT, *as calling for the opinion of the witness on matters in controversy in this case.*]

Ans. He stated that he had documents that would conclusively prove that Gregory had no claim upon these notes; he also said that Pike had no right to these notes; and I don't feel able to give an opinion about it.

Cross-Int. 52. Will you not state whether, in view of the order just shown you, signed by Butterfield as long ago as December, 1883, containing the statement that Gregory then was the owner of said note of $15,000, you now believe that Butterfield told the truth when he said to you in August last that neither Gregory nor Pike had any right to this $15,000 note, but that it belonged to him, Butterfield, or to that effect?

[*Objected to by* Mr. SWIFT, *as calling for the opinion of the witness on matters both of fact and of law in controversy in this suit.*]

Ans. It doesn't seem right that I should be called upon to give an opinion upon this subject; and inasmuch as I think that Kemp van Eé was the joint owner, if there was ownership, with Gregory, I think that Butterfield was mistaken in this statement made in this order on Pike, shown me, and I have no opinion to express on the subject.

Cross-Int. 53. You then decline to state whether or not you believe that Butterfield is the owner of this $15,000 note, as he told you in August last he was, do you?

Ans. I say that I don't know; there are parties that are claiming this note, and therefore I have no opinion to express on it.

Cross-Int. 54. The last question does not call for your opinion in regard to the real ownership of this note of $15,000. It merely asks you whether or not you believe that Butterfield made a truthful statement to you in August last when he told you the note belonged to him and not to Gregory or Pike or any one else; will you answer this?

[*Interrogatory objected to by* Mr. SWIFT, *as stating Mr. Brooks's interpretation of the legal effect of his own previous interrogatories, and as the statement by Mr. Brooks of matters not properly contained in an interrogatory, and as calling for the opinion of the witness upon the matters in controversy in this suit, and upon the correctness of Mr. Brooks's interpretation of his own previous interrogatories.*]

Ans. He told me that he had evidence that would establish in any court his ownership of those notes; what reason have I to doubt it?

Cross-Int. 55. Do you believe that statement so made by him was true?

[*Objected to by* Mr. SWIFT, *as before.*]

Ans. I shall not be able to give an opinion upon that subject until Mr. Butterfield has offered his testimony, his proofs, for I don't know what they are.

Cross-Int. 56. You have been asked several times to state your belief as to the truth of the statement of Butterfield to you in August last. In your answer to Cross-Int. 54, you said substantially that you had no reason to doubt his statement, or rather asked, "What reason have I to doubt it?" I wish to know whether in fact you do doubt it or believe it. It is perfectly easy for you to answer this question, if you choose. It is also easy for you to decline to answer it, if you choose. I insist that you shall either answer or decline to answer it, and desire you to do so.

[*Objected to by* Mr. SWIFT, *as before.*]

Ans. I will repeat the interrogatory I made before, "What reason have I to doubt it?" I have formed no opinion upon this subject, and shall decline to answer any further questions upon it.

Cross-Int. 57. Am I to understand from your last answer, not

only that you have no reason to doubt the truth of Butterfield's statement to you in August last, but that you do not in fact doubt it?

[*Same objection by* Mr. SWIFT, *as before.*]

Ans. I decline to answer.

Cross-Int. 58. Has Butterfield made any claim upon you as the owner of these two notes in suit, or did he do so in August last, other than may be inferred from the fact of his claiming to be the owner of said notes?

Ans. He forbid my paying the notes to other parties, but said, if Pike should get them, he is responsible, and I can recover them from him. That is as far as I remember.

Cross-Int. 59. As between Gregory and Pike as claimants of these notes, Butterfield then preferred that Pike's claim should be sustained, did he not, or did you not so understand from him?

Ans. I don't remember any other expression of opinion on the subject than I have previously stated.

Cross-Int. 60. Did you seek this interview with Butterfield?

Ans. I did not.

Cross-Int. 61. Did you meet him casually in California?

Ans. I met him on the street in San Francisco, corner of Montgomery and Pine.

Cross-Int. 62. Was it a chance meeting?

Ans. It was a chance meeting. I will say now that he had previously called on me at the hotel, but we had no conversation on this subject.

Cross-Int. 63. Did the entire conversation between you and Butterfield at that time take place on the street at this casual meeting, or were there other interviews between you and him on the subject?

Ans. The substance of it occured at this meeting on the street, but subsequently I saw him once or twice at my hotel.

Cross-Int. 64. Did you and Butterfield arrive at any agreement or understanding in regard to the course you should pursue respecting these notes held by Pike?

Ans. No definite agreement. He understood that the case would come before the court here in Boston in October or November, I

think I told him in October, and he wanted his case presented to the court, and said he would furnish me with all the documents that were necessary to prove his claim, but there was no agreement that I would do so made or talked of that I remember.

Cross-Int. 65. Are you, in giving this deposition today, carrying out in any degree the request made to you by Butterfield that you would present such evidence or documents as he furnished you in support of his claim to these notes, or intending to do so?

Ans. I am not; I am merely stating the facts, to the best of my knowledge and belief. I have received only a very few documents from him, and haven't taken steps to procure more.

Cross-Int. 66. What motive have you in bringing forward on this occasion the claim of Butterfield to these notes, and in producing the Exhibit California Suit sent you by Butterfield, as you state, to be presented on this occasion, if I am correct in understanding you?

Ans. My motive is that all the claimants may have a chance to prove their claims.

Cross-Int. 67. I now hand you the original receipt, copy of which is printed in this record at top of page 3, purporting to be signed by G. W. Butterfield, and dated April 9, 1883. Please examine the same and say whether or not the signature is in the handwriting of G. W. Butterfield.

[*Objected to by* Mr. SWIFT, *as going into matters not inquired about in the direct examination.*

Objected to generally by Mr. TALBOT.]

Ans. I think it is.

Cross-Int. 68. You perceive that this receipt refers to two of the four original notes made by you to Butterfield, April 9, 1883, of $20,334.60 each, described as payable to order of George W. Butterfield, and setting forth that the said notes belong to Charles A. Gregory, and containing an agreement by Butterfield to deliver the same to him upon request, or the full amount of money expressed therein. Does not this recital, signed by Butterfield, furnish in your mind some reason for doubting the truth of what you say Butterfield told you in August last in California, relating to the notes in suit, which were given you in exchange for the notes named in this receipt, or in part exchange therefor?

[*Objected to as above, and as calling for the opinion of the witness on matters of law and of fact involved in the controversies in this suit. Counsel for the defendant Swift states to the witness that he may properly decline to answer this question, if he so desires.*]

Ans. I decline to answer.

W. C. N. SWIFT.

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 13.

DEPOSITION OF FREDERIC W. GREGORY.

Direct Examination by FRANCIS A. BROOKS, Esq., *of Counsel for Complainant.*

BOSTON, Jan. 9, 1886.

Int. 1. Please state your name, age, residence, and occupation.

Ans. Frederic W. Gregory; fifty; Boston, Mass.; commission merchant.

Int. 2. Are you a brother of Charles A. Gregory, the plaintiff in this suit?

Ans. I am.

Int. 3. Do you know George W. Butterfield?

Ans. I do.

Int. 4. If you ever had any business communication with said Butterfield in relation to a certain note or notes by W. C. N. Swift and in possession of said Butterfield and claimed by your brother Charles to belong to him, please state what such communication was, and all that took place between you and Butterfield with regard to said note or notes, giving particulars and dates.

[Mr. TALBOT *objects to the witness stating anything that passed between himself and Butterfield.*]

Ans. I had communication with Mr. Butterfield; had a talk with him; I think it was towards the last of July, 1883. I saw Mr. Butterfield at the Quincy House in this city: told him I had an order from my brother Charles, to obtain from him a note which belonged

to my brother, signed by Mr. Swift, for about twenty thousand dollars. I had a written order, which is the reason I do not remember the particular figures. I showed this order to Mr. Butterfield, and asked him for the note; he declined to give it to me, saying something to this effect; I can't remember exactly what he stated; but it was to the effect that he hadn't it with him, but that he would get it and give it to me, and I was to meet him, I think the next day, and get it. When I next called, I can't say whether it was the next day or the next day after, at the Quincy House, he and his wife and some others were standing together and their trunks were there, and they were about to start for the Portland train, as he informed me; I asked him for the note. He said it was in the trunk, and he couldn't give it to me. He said he was going down in Maine or East, — I can't say which he said, — and that he would give it to me when he returned; he had to hasten right away. They were all standing there waiting to take the carriage for the train.

Int. 5. Did you again seek and find Mr. Butterfield after his return from Maine, and what further communication did you have with him, if any, with regard to said note?

Ans. I did see Mr. Butterfield on his return from Maine, and asked him for the note. He informed me that he had used it or wanted to use it,—I can't remember now which expression he used,— and was going to cable Charles, who was then in London, or had cabled him, — I can't say whether he referred to the present or past in this matter, — for permission to use the note. In consequence of something I said, — I was a little surprised, — he said, "Oh; it will be all right; I'll make it right with Charles." I don't know as those were the exact words, I can't remember the exact words at this time; but that was the purport of it. I think I said to him, I was surprised that he should use it, as he had no right to, and the purport of his answer was that he wouldn't do it unless he got permission from Charles. That was the purport of it, though perhaps not the exact words. I didn't afterwards see Mr. Butterfield on this subject.

Cross Examination by THOMAS H. TALBOT, Esq., *of Counsel for the Defendant Pike.*

Cross-Int. 6. What did you do with the order which you say you had?

Ans. I put it in my safe at the store at that particular time.

Cross-Int. 7. Did you present it to Butterfield?

Ans. I had the order with me when I called on him the first time, and presented the order to him.

Cross-Int 8. Where is it now?

Ans. I don't know. I had a large number of letters and papers, and when Charles returned from Europe I read the letters and papers over to him, or a large portion of them, and in talking the matter over, I destroyed the papers or gave them to him. I gave the most of the papers to him. I haven't the order now and haven't seen it since the interview referred to with my brother.

Cross-Int. 9. You gave all those papers which were not destroyed to your brother at that time?

Ans. I gave a number of papers to him, and he destroyed a great many papers. I had other papers relating to other matters, which I kept.

Cross-Int. 10. Was this order among the papers so given to your brother Charles?

Ans. I cannot say.

Cross-Int. 11. You say you demanded a note of Butterfield. Can you describe the note so demanded?

Ans. My recollection is it was a note signed by a Mr. Swift, — W. C. N. Swift, I think, — for $20,000 and upwards.

Cross-Int. 12. You say, in speaking of the interview between you and Butterfield after he returned from the East in August, that Butterfield may have used the expression that he had used the note. Please to refresh your recollection, and state this as definitely as you can.

Ans. I cannot state it any more definitely than that at the present time.

Cross-Int. 13. Is it in your recollection that he said he had used the note?

Ans. It seems to me that was it, but I can't recollect whether he used the present or past tense when he spoke at that time.

Cross-Int. 14. How did you receive your instructions from your brother to make this demand upon Butterfield?

Ans. By letter and by cable.

Cross-Int 15. Have you the letter and the cable?

Ans. I have not. They were either destroyed at the time before stated, or given to my brother.

Cross-Int. 16. Did you report your interviews with Butterfield to your brother Charles; if so, how and when?

Ans. I did; both by letter and I think by cable, at the time. I think I wrote my brother after each interview with Butterfield, and that I cabled him but once; and I think this cable must have been after the last interview with Butterfield.

Cross-Int. 17. Have you copies of those letters and that cable?

Ans. I have not.

Cross-Int. 18. Did you report to your brother what Butterfield said, as you have now stated it in this examination?

Ans. As nearly as I can recollect, I did, each interview.

[*Question is objected to by* Mr. BROOKS *because it is not material whether the reports made by the witness to his brother, in July and August*, 1883, *in regard to this interview with Butterfield, is or is not precisely the same report of the interviews that the witness has given in his deposition in this case, and there is no reason why the witness should be called upon to compare the reports of those same interviews as made in this deposition and as made by him to his brother in July and August*, 1883, *which comparison the question calls for.*

If the witness had not already given an answer to the question which has been taken down by the examiner in a way which seems to me to be liable to lead to confusion or mistake, I should have desired to ask the witness to decline to answer the question as wholly immaterial; but in view of the fact that he has answered it, I now request the examiner to ascertain from the witness, whether the answer as given by him conveys the meaning which he intended; that is to say, whether he intended by the answer to state that he had, in 1883, *July and August, given the same report of these interviews to his brother Charles which he has this day given in his answer in this deposition.*

The examiner states to the witness that he, the examiner, has taken down the witness's answer exactly as he, the examiner, understood it; that the witness may now add anything he pleases to the answer as taken down, or may leave it as it now stands, just as he, the witness, pleases.]

I will add this: I think I wrote him the purport but perhaps not the language of the interviews.

Cross-Int. 19. Were your reports by letter as full as your statements have been in this examination?

[*Objected to by* Mr. BROOKS *as calling for a comparison between the testimony of the witness in this deposition and the reports made by the witness to his brother Charles on the same subject matter in July and August*, 1883. *Such comparison must be wholly immaterial, unless for the purpose of contradicting the witness by showing an inconsistency between the statements contained in this deposition and the reports as made to the plaintiff by the witness in July and August*, 1883. *The witness having already stated that he has no copies of the reports made by him in July and August*, 1883, *to his brother, it is impossible for the defendant Pike to impeach the witness on any such ground, and the plaintiff's counsel*, Mr. BROOKS, *therefore advises the witness that he cannot be required to answer this question unless he wishes to.*]

Ans. I cannot remember; I was writing him from time to time and therefore cannot now remember what I said. I gave him the purport of my interviews, I think. I cannot remember now about the particulars.

Cross-Int. 20. Did you give him the purport of your interviews, as you have stated them in this examination?

[*Same objection by* Mr. BROOKS *as before.*]

Ans. If you mean the exact phraseology, I should say no, but the purport of those interviews I think I gave him.

Cross-Int. 21. Did you report what Butterfield said to you in substance as you have stated it in this examination?

[*Objected to as before, and also because the same question has been already put and answered several times, and is and must be known to the counsel for defendant Pike as immaterial to any questions before the court, unless he intends to impeach the witness.*]

Ans. I presume I did; I was writing him from time to time; it might have been in conversation I had with him after his return home; I cannot now recollect.

Cross-Int. 22. In reference to your first interview, you say that Butterfield said in substance, referring to the note, "that he hadn't it with him, but that he would get it and give it to me, and I was to meet him" the next day or the next day after. Did you report the substance of this in the letter which you say you sent your brother immediately after this interview?

Ans. I think I wrote him the substance of these interviews; I don't know that I sent him a letter after each interview, but I reported the substance, I think, when I did write to him, probably soon after. That has been the meaning of my language all through.

Cross-Int. 23. Did you report to your brother that you demanded the note of Butterfield; and did you report to him what Butterfield said in reply to that demand?

[*Objected to by* Mr. BROOKS *because already asked and answered several times.*]

Ans. I can't answer that question any more than I have. I think I have answered it as fully as I can.

Cross-Int. 24. Did you make any other demand on behalf of your brother for any note or notes signed by W. C. N. Swift?

[*Objected to by* Mr. BROOKS, *unless it relates to demands made upon Butterfield, as not being relative to the matter of the examination in chief.*]

Ans. I did.

Cross-Int. 25. Of whom, where and when?

[*Same objection, the question now being admitted to a demand made upon some other person than Butterfield.*]

Ans. Of Mr. F. A. Pike, the last of December, 1883, in Calais, Me., where he lives.

Cross-Int. 26. Was that demand in writing?

[*Same objection.*]

Ans. I personally had an interview with Mr. Pike, together with my brother's demand in writing, which I presented before a witness.

Cross-Int. 27. From whom did you receive this written demand?

[*Same objection.*]

Ans. From my brother Charles, who was then in London.

Cross-Int. 28. Was it signed by him?

[*Same objection.*]

Ans. It was. On further reflection, I find that the order on Pike for the note was signed by Geo. W. Butterfield. I received two orders, one for each note, both signed by Butterfield.

Cross-Int. 29. What did you do with these orders?

Ans. I took them to Calais, read them to Mr. Pike, demanded the notes. I afterwards gave them to my brother Charles, after he came from Europe, I think.

Cross-Int. 30. Did you have any other order upon Pike than two signed by Butterfield, as you have testified?

Ans. I do not now remember any other.

Cross-Int. 31. Did you have in your possession at any time an order on Pike for notes signed by W. C. N. Swift, which order was signed by your brother Charles and one Kemp van Eé?

[*Objected to as not in reply to examination in chief or material.*]

Ans. Not to my recollection.

Cross-Int. 32. Have you now with you any copies of the orders which you showed to Pike, as you have testified?

[*Same objection.*]

Ans. I have no copy. I have a memorandum which refreshes my memory, that is, a letter from my brother.

Cross-Int. 33. Are you positive that you never had any order on Pike than those signed by Butterfield? Did you never have an order on Pike signed by your brother and not by Butterfield?

[*Same objection.*]

Ans. My recollection is that I never had any other orders on Pike than these two which I presented, signed by Butterfield.

Cross-Int. 34. Will you examine a paper printed on page 13 of the record on this case and say whether the original of that paper was ever in your possession?

[*Objected to by* Mr. Brooks:

1*st*. *Because immaterial.*

2d. Because not in reply to the direct examination.

3d. Because the witness is shown a portion of the record in this case, or what purports to be a document referred to in the answer of the defendant Pike, as to which copy the witness has and can have no knowledge, and is asked to say whether he ever had in his possession an original paper of which that purports to be a copy, or is said by Pike to be a copy, and because in order to prove such original document referred to by Pike in his answer in this case, the original should either be produced or its absence accounted for by the defendant Pike.]

Ans. I do not remember ever having it in my possession.

FREDERIC W. GREGORY.

Attest: JOHN G. STETSON, *Examiner.*

EXHIBIT 14.

DEPOSITION OF CHARLES A. GREGORY.

Cross-Interrogatories by THOMAS H. TALBOT, Esq., *of Counsel for Defendant Pike.*

Cross-Int. 11. What is your profession and age?

Ans. I am by profession a lawyer, and about fifty years of age.

Cross-Int. 12. Have you seen a copy of the printed record in this case? Was such copy sent to you by your counsel? If so, as far as what page? Have you carefully read the same? Have you such printed copy now in your possession?

Ans. I have at some time seen some portions of what purported to be the printed record in this case. I have not seen the whole of the printed record. I have never carefully examined the same.

Cross-Int. 13. Had you previously to April, 1883, sold stock in the Grand Sierra Consolidated Mining Company to W. C. N. Swift, the promisor of the notes in controversy in this suit? If so, when and how much, and at what price per share?

Ans. About April, 1883, some stock of mine in the Great Sierra Consolidated Silver Company, of Chicago, Ill., eighty thousand shares, was sold to said Swift at the price and amount that I have previously testified to in this case.

Cross-Int. 14. Did you or not receive any money of Butterfield, on account of the sale of stock made by him to Swift? If so, when and how much?

Ans. I received $5,000 in money from Mr. Butterfield, part of the consideration paid by Mr. Swift for such shares of stock. This was in April, 1883.

Cross-Int. 15. Did you prior to making a bargain with Butterfield and Jones, as afterwards reduced to writing, May 1, 1883, read the contract between Pike and Butterfield of Jan. 29, in that year?

Ans I never saw the contract of Jan. 29, inquired of, between Pike and Butterfield, prior to the bargain between Butterfield, Jones and myself, which is evidenced by the writing of May 1, 1883.

Cross-Int. 16. Did you or not have an interest of one-eighth part in the contract with Pike of Jan. 29, 1883? Did you not have such interest, by oral agreement, as early as April 9, 1883, and by written contract of May 1, in the same year?

[*Objected to by plaintiff because not material to issue and not matter of examination in chief.*]

Ans. I did have an interest in the properties referred to in the contract of May 1, 1883, which was signed by Butterfield and myself, and on the part of Jones by Butterfield. The interest is described in that writing. I did have the option and offer of such an interest by oral agreement, prior to April 9, 1883.

Cross-Int. 17. If you say you did not make a bargain in New York, before leaving for Europe, by which you were to have an interest under the above contract of Jan. 29, 1883, please state how you happened, before so leaving, to put the Swift notes in Butterfield's, or in Butterfield and Jones's hands, as collateral security for ten thousand dollars, to be paid to them on a contract.

[*Objected to as to Int.* 16, *and also because it assumes a state of facts not proved or admitted.*]

Ans. In reference to the Cross-Int. 17, the bargain there spoken of was orally agreed upon, prior to the 9th of April, and is set out in the agreement of May 1, 1883, above referred to.

Cross-Int. 18. What were the conditions on which you deposited the Swift notes with Butterfield, or returned them into his hands? Why did you allow them to remain so long in his control?

[*Objected to as to No.* 17.]

Ans. The conditions upon which the Swift notes were left by me with Butterfield are evidenced by writings signed by me or by Butterfield, or by me and Butterfield. I have exhibited in evidence the written receipt from Butterfield, on which he received the two original notes, April 9, 1883; and the writing signed by me on that date has been herein shown in evidence. These notes were my property and to be held for me. In answer to the latter part of Cross-Int. 18, I have never been able to get them out of Butterfield's hands.

In further answer, I state that in July, 1883, I requested Butterfield to deliver to me the note of Swift for $20,334.60, which matured at three years. He then told me he had the two original notes in Boston. He said it was in Boston, and he would give it to me when he got there. I showed him in July, 1883, an order to deliver that note to my brother Frederic, for me. He said he would do so as soon as he arrived in Boston. I sent the order to Frederic, and he upon that order demanded from Butterfield the note, and could not get it.

Cross-Int. 19. Will you please state whether or not the following is a true copy of a contract entered into by you, as it purports to be?

[*Objected to as above.*]

[COPY A]

Memorandum of agreement between GEORGE W. BUTTERFIELD *and* CHARLES F. JONES, *parties of the first part, and* CHARLES A. GREGORY, *party of the second part, and all belonging to the United States of America.*

Whereas, said parties of the first part have purchased the "May Lundy," "Lake View," and "Lucky Morton" mines, situated in Homer Mining District, Mono County, State of California, for the sum of two hundred and fifty thousand dollars, lawful money of the United States, upon the following conditions, to wit: Ten thousand dollars cash, and the balance on or before the thirtieth day of July, A. D. 1883.

And whereas, said parties of the first part have bonded various other property in said district from one Howk, one Carpenter, and

one Gilchrist, and also contemplate bonding other properties to be included; and whereas, it is the purpose, desire, and intention of the said parties of the first part to sell all or a part of said properties, either in the United States or in Europe, on such terms and conditions as they may think advantageous for all parties of this agreement.

Now this agreement witnesseth, That said parties of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to us paid by the party of the second part, and the further consideration, hereinafter to be mentioned, do hereby covenant and agree to and with the party of the second part, to give him, the said party of the second part, a one-eighth (1-8) part of the moneys or values realized from the sale of said "May Lundy," "Lake View," and "Lucky Morton" mines over and above the price paid for the same; also one-eighth (1-8) part of all the moneys on other values realized from the sale of said mines bonded from one Howk, one Carpenter, and one Gilchrist, or others included in this sale.

It is further agreed that in case said mining properties are not sold or otherwise disposed of, then the said parties of the first part shall assign, transfer, and set over to the said party of the second part an undivided one-eighth (1-8) of all the mines now bonded from Howk, Carpenter, and Gilchrist.

It is also agreed by and between the parties of the first and second parts to this agreement, that said party of the second part shall devote his time and energies in assisting said parties of the first part to make a sale of all or any part of said mining properties, under and subject to the discretion and approval of the parties of the first part or either of them.

It is further agreed by and between the parties of the first and second parts, that the expenses of said party of the second part, pending such negotiations, shall be defrayed by said parties of the first part.

In witness whereof, we have hereunto set our hands and seals this first day of May, 1883.

(Signed) G. W. Butterfield.
C. F. Jones, *per G. W. B.*
Charles A. Gregory.

Ans. The copy set out in this interrogatory of the agreement seems to be substantially correct as a copy of the agreement which I made with Butterfield and Jones.

Cross-Int. 20. Was not the above contract, which was executed in writing as above, May 1, agreed upon prior to your leaving America for England, April 9, 1883?

[*Objected to as above, and because it assumes what is not proved nor admitted.*]

Ans. The contract referred to as executed May 1, 1883, embraces the agreement of the parties as the same was contemplated in the early part of April, 1883.

[*Cross-Int.* 21 *is stricken out.*]

Cross-Int. 22. If you say the bargain made in New York differed from this in writing (copied in Int. 19), please state in what particulars it differed.

[*Same objection.*]

Ans. Cross-Int. 22 seems to require no answer.

Cross-Int. 23. What was to be your compensation for the services which you went to England to render?

[*Objected to as immaterial.*]

Ans. The writing of May 1, 1883, embraces the agreement as to compensation for services. It is the only agreement I ever made in reference thereto.

Cross-Int. 24. Did you or not, previously to Butterfield's sailing for America, in July, 1883, aid Butterfield in organizing a company called the May Lundy Mining Company (Limited), having a capital of seven hundred and fifty thousand pounds sterling (£750,000), and a debenture issue of three hundred seven thousand five hundred pounds (£307,500), and preferred stock for a large amount?

[*Objected to as before.*]

Ans. I rendered such assistance as I could to Butterfield while in London, with reference to the organization of the company called the May Lundy Company (Limited). Without reference to the prospectus of that company, I cannot state precisely the capital and particulars of it.

Cross-Int. 25. When Butterfield sailed for America in July, 1883, did you not remain in London, for the purpose of carrying the projected scheme of sale to a successful conclusion? And did not that success depend upon an extension of time by Pike? Could it have been carried through without such extension?

[*Objected to as above.*]

Ans. I remained in London after Butterfield returned in July,

1883, from America, for the purpose of rendering such assistance to him as I could in reference to the sale of the mines. Without his obtaining the title from Pike to the mines, I do not know how they could have been sold by him to the May Lundy Company. They were not sold.

Cross-Int. 26. What was to be your compensation for services rendered by you after July 31, 1883?

[*Objected to.*]

Ans. I never had any agreement or compensation for services or interest in the property with Butterfield or with Jones, other than that set out in the writings hereinbefore referred to.

Cross-Int. 27. Did or not your brother, Frederic W., report to you what passed between him and Butterfield in July and August, 1883, in which interview he, by your order, demanded one or more of the Swift notes from Butterfield? Was there not a report of each such interview? How many of such reports were made by letter, and how many by telegram? Have you now any of such letters or telegrams? If you have any such, will you please annex them to this your deposition? If you do not have any of them, will you please to state what has become of them?

Ans. I do not know of what passed between F. W. Gregory and Butterfield in July or August, 1883, other than what is disclosed by the letters in reference thereto which I have produced. I know of no other communications on that subject from Frederic, except as I have produced. But that I may not be misunderstood, I will state that in the statement made by Butterfield to Frederic, that Butterfield had permission from me to use the Swift notes with Pike, is not true, in point of fact, and was known to Butterfield at the time not to be true. That statement was made to Frederic after Butterfield came back to Boston from Calais, — was made by Butterfield as an excuse for his not delivering the note to Frederic, as he promised to Frederic to do before he went to Calais.

Cross-Int. 28. Did he not report to you that he found Butterfield, on one of those occasions, about leaving for Down East or Maine; and that Butterfield said that the note demanded was in his trunk, which was going along with him?

Ans. This seems to be fully answered already.

Cross-Int. 29. Did he not report to you that he saw Butterfield after he returned from Maine, or Down East, and that in that interview Butterfield said that he had used one of the Swift notes?

Ans. This seems to be fully answered.

Cross-Int. 30. Did not Jones, very soon after his arrival in London, in August, 1883, either show you the contract of July 31, with Pike, or tell you the terms of it, and propose to give you one hundred thousand dollars ($100,000) of additional stock on account of having put up the Swift notes with Pike as collateral security?

Ans. Jones never showed me the contract of July 31, 1883, which was made with Pike, or told me the terms of it. He did propose about the time inquired of to give me the stock when and if he should get such stock in the May Lundy Company (Limited) of the nominal value of one hundred thousand dollars, if I would take the same in satisfaction of their having made use of the Swift note or notes with Pike, in that connection; but I refused to take it, and refused to ratify the use of the note or notes. I did not know at the time what notes had been used nor the form of the notes as the same had been used. I never saw the contract of July 31, 1883, or any copy of it, until it was shown to me by Butterfield after his return to London, in December, 1883.

Cross-Int. 31. Did you in 1884, in any of the courts of this State (Massachusetts), bring a suit against said Charles F. Jones for his alleged conversion of any of your Swift notes? In that suit was Jones arrested and committed to jail; and was there a hearing before a justice of the Supreme Court, on his petition under a writ of *habeas corpus* for a reduction of bail, in which you testified as a witness?

Ans. I did bring such a suit against Charles F. Jones as inquired of. Jones was arrested and committed to jail in that suit. There was a hearing before a justice of the Supreme Court of Massachusetts in that case, on petition of a writ of *habeas corpus*, for a reduction of the bail, in which case I testified as a witness.

Cross-Int. 32. Is the following a substantially correct report of a question addressed to you by your own counsel, Mr. Dearborn, and of your answer to that question, in that hearing?

"*Question.* — You have heard the testimony of Mr. Jones as to what occurred on the second day after his arrival in London; I want to ask you whether that is true.

Answer. — It is not true that he told me that he went down to Mr. Swift and made a change of those notes. No reference to that transaction was made by him at all. He did say that he and Butterfield had been down to Calais, and had put up a note of mine; but so that I could get it back again; and in the course of the conversation that we made over it, he did offer me once, that if I would call it square, he would give me a hundred thousand dollars of his stock. I never accepted it, but complained and said I was thoroughly dissatisfied. I quarrelled with him one day in an omnibus, and he pulled the strap and got out."

[*Objected to as not material and not matter of examination in chief.*]

Ans. I should think that the question and answer were correctly set out in substance.

Cross-Int. 33. Does the above reported answer state what passed between you and Jones on the second day after his arrival in London, substantially as it passed? If it does not, please state how you would now modify that answer.

[*Objected to, as the question assumes certain statements to have been made by witness not in issue, and then inquires as to any error therein made.*]

Ans. It seems not to need further answer.

Cross-Int. 34. In the above conversation with Jones, on the second day after his arrival in London, did you or he say anything about the increase of your interest in the May Lundy mines, which increase had been demanded by you, by cable, as stated in your answer to Cross-Int. 25 of your deposition before given in this case? (Record, p. 34.) Did you express any dissatisfaction because your interest had not been increased in accordance with your demand? Was it any such dissatisfaction which led to Jones's offer to you of "a hundred thousand dollars of his stock"? If not, please state what conversation did lead to that offer.

[*Objected to as predicated on an assumed state of facts, and as not material in any view of the facts.*]

Ans. In reference to the matter inquired of, I wish to be understood as saying that I never consented to such use as was made of

my notes with Pike, in July, 1883; and the dissatisfaction and protest that I expressed was to any use of my notes in that connection, and not a dissatisfaction as to the matter of increase of my interest in the mines or proceeds of sale of the mines, if any should result. I never authorized the use of the notes upon any increase of my interest in the mines or the proceeds of the sale of the mines. I forbade Mr. Butterfield, both before he left London, in July, 1883, and by telegraph to him, after he left London, to make any use of my notes. The cablegram of about Aug. 7, 1883, referred to in reference to the increase of interest and to the use of the notes, was made for the sole purpose of informing him that I forbade him the use of the note or notes. I did not know when I sent the cablegram of Aug. 7, 1883, that he had already used the notes, and I meant to forbid him to use the notes thereby. I did not know then anything about the terms concluded upon between him and Pike, nor his intentions with reference to any agreement with Pike. I did not know of any increase of price or modification of the original agreement. I meant to put the matter so that he could not infer that I consented to a use of my notes with Mr. Pike, and to show him that he must have further correspondence with me on the subject. His cablegram to me, signed "Jones," which I received about Aug. 6, 1883, said, "Must adhere original contract," etc., which I now refer to in this connection. My cablegram to him which said, "Prefer not to use note. I forbid using note except increase interest," was sent to him upon my receiving the cablegram from him which contains the words, "Must adhere original contract," etc. An increase of my interest in the mines had not been agreed on before he left London, and none was ever afterwards agreed upon. I now reply further to the Cross-Int. 34, that the dissatisfaction I expressed was not with reference to the quantity of increase of interest, although such an increase as was proposed by Jones was of little value and absurd under the circumstances, and was unsatisfactory, and so declared to be.

Cross-Int. 35. Did your quarrel with Jones in the omnibus arise out of the fact that one or more of the Swift notes had been put up with Pike, or out of the fact that your interest had not been increased, as you demanded, or out of both facts?

[*Same objection as above.*]

Ans. I think I have answered Cross-Int. 35.

Cross-Int. 36. In the same hearing, were the following questions put to, and answers made, by you?

"*Question.* — You knew Mr. Butterfield had dealings with Mr. Pike?

"*Answer.* — Yes, sir.

"*Question.* — Was your interest increased?

"*Answer.* — Never.

"*Question.* — Sure of that?

"*Answer.* — I know it.

"*Question.* — What is your interest in that stock?

"*Answer.* — According to that contract. It states.

"*Question.* — About an eighth?

"*Answer.* — That is my recollection."

[*Objected to as above.*]

Ans. I cannot state what questions were put to me and what answers were made by me on that hearing, without reference to the report of the case in its whole connection.

Cross-Int. 37. Do those questions copied last foregoing, and the answers thereto, relate to the same demanded increase?

[*Objected to.*]

Ans. Cross-Int. 37 is already answered.

Cross-Int. 38. In your deposition before given in this case, in answer to Cross-Int. 29, you state that prior to December, 1883, you understood that Jones and Butterfield had a right to sell the May Lundy mines, such right extending to Jan. 1, 1884; and that the price they were to pay had been increased by Pike $100,000, and that the payment was to be made before Jan. 1, 1884. Now, when you learned these facts, did you learn nothing whatever about any cash payment which was to be made on the execution of such contract of extension? Did you learn nothing of $25,000 which was secured to Pike as a cash payment? Did you ask no questions upon that point? If you did ask, what information did you obtain, satisfactory or otherwise? Did you learn what one of the Swift notes had been put up for? If so, for what was it put up, as you learned? If you did not inquire about this, why did you not?

Ans. I made inquiry of Jones with reference to what had been done with Pike; and I received from him evasive and unsatisfactory answers. I was told that one of the Swift notes had been used in some way with Pike; but that they could get it back again, and that it was all right; but to me it was not all right. I will state that I did not learn the particulars of the transaction from Mr. Jones, and that he used concealment in reference to the same, and was irritated and angry when I talked with him about it. He told that if the May Lundy sale did not succeed, that the note was to be given up by Pike. I did not learn what one of the Swift notes had been put up, and I did not know that the original notes had in any way been changed. I was left to suppose that such notes as had been used was one or some of the original Swift notes.

Cross-Int. 39. Did you not, at once, upon the arrival of Jones in London, about the 25th of August, ask him about the new contract with Pike?

[*Objected to as assuming that the new contract in July* 31, 1883, *was known to witness in August*, 1883.]

Ans. I asked Mr. Jones on his arrival in London what had been done with Pike; and his communications to me on that subject were unsatisfactory and indefinite.

Cross-Int. 40. If you say you did not ask Jones about the terms of the new arrangement with Pike, please state why you did not.

[*Objected to as immaterial.*]

Ans. This cross-interrogatory has been answered.

Cross-Int. 41. Please state, as near as you can, when Jones first told you that one of the Swift notes had been put up with Pike. Was it not on the second day after his arrival in London?

[*Objected to as assuming witness to have received such information from Jones.*]

Ans. This cross-interrogatory has been substantially answered.

Cross-Int. 42. When did J. C. Kemp van Eé reach London last before the close of the year 1884; and how soon thereafter did you see him? Did Butterfield come in the same steamer with him? If not, how soon before or after?

[*Objected to as immaterial and not subject of direct examination.*]

Ans. I saw J. C. Kemp van Eé. I cannot now state just when Kemp van Eé arrived in London. I saw him soon after his arrival. How soon before Butterfield came I do not now remember, but I saw Kemp van Eé before I saw Butterfield on his re-arrival.

Cross-Int. 43. What was the prospect of effecting a sale of the May Lundy mining properties in the months of August, September and October?

[*Objected to as above.*]

Ans. I should say the prospects were pretty desperate. There were no prospects of realizing on a sale: a nominal company was about all there was of it.

Cross-Int. 44. Did not you or Jones or both, in September or October, make an arrangement with Robert Walker of Glasgow, one of the directors of the May Lundy Mining Company (Limited), to go to that mine to examine the property?

[*Objected to as above.*]

Ans. Some time in September or October an arrangement was made with Robert Walker to go to the May Lundy mine and examine it. I knew of that arrangement.

Cross-Int. 45. Did Mr. Walker go under this arrangement? If so, at what time did he return? And did you remain in London with Jones for the purpose of carrying the scheme of sale to a conclusion?

[*Objected to as above.*]

Ans. Mr. Walker went to see the mines under that arrangement. Was absent some time and returned; but I remained in London beyond the period of his absence. Jones was there at the same time that I was there. The purpose of selling the May Lundy properties was still prosecuted during that time.

Cross-Int. 46. When did said Kemp inform you that the original Swift notes had been by Jones surrendered to Swift and new notes taken in place of the same, payable to Jones? Did he not so inform you immediately upon his arrival as above, the same day of such arrival, or the next thereafter; was it not in the first interview you had with him after such arrival?

[*Objected to as not matter of examination in chief.*]

Ans. Kemp van Eé informed me of the conversion of the origi-

nal Swift notes soon after his arrival in London, in December, 1883; the precise date I cannot now state.

Cross-Int 47. In your deposition before given in this case, you say that you produce one of two orders on the defendant Pike, given you by Butterfield. Where is the other of those orders? If you have it, will you not produce it, and annex it to this deposition? If you do not have it, will you please to state how it has been disposed of by you?

[*Objected to as not matter of examination in chief.*]

Ans. I now produce the other of the two orders drawn on Pike, by Butterfield, at London, Dec. 13, 1883. Here is the duplicate original of such order. I cause it to be marked by the commissioner herein as "O. P. Q.," and retain the same. A true copy of it is as follows: —

"F. A. PIKE, *of Calais, Maine, U. S. A.*

Dear Sir, — Please deliver to Charles A. Gregory, of Chicago, Illinois, or to his order the note made by W. C. N. Swift, of New Bedford, dated April 20, 1883, for $20.33\frac{66}{100}$ payable in three (3) years from its date, placed in your possession by me: the same being the property of said Gregory now and at the time I placed the same in your possession.

LONDON, Dec. 13, 1883.

(Signed) G. W. BUTTERFIELD."

An original duplicate of this was sent to Pike; delivered to him in December, 1883, by Frederic Gregory, at my request. Pike told me afterwards that he received it.

Cross-Int. 48. Did you yourself draw any order upon Pike for one or both of the Swift notes? Did you sign any such order; and if any one else signed it with you, will you please state who so signed it? What did you do with that order?

Ans. I did draw an order on Pike and wrote it for the Swift notes, and signed it; and, by reason of certain matters between Kemp and me, the same order was signed also by J. C. Kemp van Eé, and such order was sent to my brother Frederic, in order that he as my agent should get the notes for me, as requested by Kemp and me.

Cross-Int. 49. Will you please examine in the printed record of

this case Exhibit A, annexed to the answer of the defendant Pike, and say whether you recognize that as a true copy of an original paper signed by you and said J. C. Kemp van Eé, as it purports to be? Was the original written as well as signed by you?

Ans. The printed record referred to is not before me. I do not examine it therefore. I could identify the order on Pike if shown to me.

CHARLES A. GREGORY.

Attest: CHARLES H. WOOD, *Commissioner.*

EXHIBIT S, C. H. W., COM'R.

BOSTON, July 30, 1883.

BROTHER CHARLES,

London, Eng'd.

Your favors of 14th inst., also later one without date, containing blank order for Butterfield to sign are at hand, and contents carefully noted.

I saw Mr. "B." on Saturday at the Depot (on his return from New York), and just as he was going to Calais, Me., to see Pike; said he should return in a few days, and he would let me know just as soon as he did return, and would then hand me the note, etc., and I will then attend to your several requests.

I went out to Framingham with wife Saturday, and spent Sunday at Frank's at his *palatial farmhouse;* he certainly has a nice place and delightful outlook from his house, overlooking 60 to 80 acres of his own farm. All are well and out to Wellesley for the summer and enjoy the change much. Am heartily glad on your account to know the Mining Scheme is successful.

Yours truly,

(Signed) FRED. W. GREGORY.

TO CHAS. A. GREGORY,

London, Eng'd.

EXHIBIT T, C. H. W., COM'R.

BOSTON, Aug. 21, 1883.

Mr. CHARLES A. GREGORY,
London, Eng'd.

Dear Brother, — Yours of the 7th inst. came to hand last evening. Glad to hear from you, and hope your matters are prospering.

In my last or previous letter, I wrote you that Butterfield had not given up to me (nor Frank) any note whatever. He said that you told him he could use it in arranging with Pike; and on his return from Maine, he told me that he had put it up as collateral with Pike; but that it could be obtained if you did not approve.

He then went to California, and said Jones would go to London and see you the next week. Since then I have not heard from or of them.

Kemp was to go to California with Butterfield. I cannot raise any further sums of money for outside matters, and you must not expect it. Can't do it. Have not seen Dr. Brooks and don't know whether he has been here or not.

With love to Harold and Julia,
I am as ever
Yours truly,
(Signed) F. W. GREGORY.

(I have one of the A B C Codes.)

EXHIBIT 15.

UNITED STATES CIRCUIT COURT.

DISTRICT OF MASSACHUSETTS.

CHARLES A. GREGORY, *in Equity*,
v.
FREDERIC A. PIKE ET AL.

And now comes the complainant Gregory and withdraws his motion for a dismissal of the bill of complaint in this cause, filed on the sixth day of December last, and he suggests to the Court and gives it to be informed that the defendant Frederic A. Pike deceased in December last, testate, but that his will has not as yet been probated, and that no letters testamentary or of administration have been issued up to the present time, either in the State of Maine, where said Pike resided, or in this district.

By his Solicitor,
F. A. BROOKS.

DEPOSITION OF CHARLES N. FOX.

Taken in Equity suit No. 2170, and used in this case, No. 2424, Equity, by consent of parties as if originally taken therein, but subject to all objections by the plaintiff Gregory, at the hearing, which could have been made by him at the time of the taking of said deposition.

This deposition was taken under commission upon interrogatories thereto annexed, Feb. 16, 1888, in San Francisco, Cal., before

L. S. B. SAWYER, *Commissioner.*

Direct Interrogatories by THOMAS H. TALBOT, Esq., *of Counsel for Defendant*, FREDERIC A. PIKE.

SAN FRANCISCO, CAL., Feb. 16, 1888.

Int. 1. Please state your name, age, place of residence, how long you have there resided, what your business or profession is, under what style you do business, who is your partner, if any, how long you have been in business where you now are, and how long in this partnership under your present style.

Ans. My name is Charles N. Fox; residence, Oakland, Cal.; have resided in this State over thirty years, and in Oakland over twelve years; my business is attorney at law; place of business 530 California Street, San Francisco; am doing business under the firm name of Fox & Kellogg; my law and business partner is M. B. Kellogg; and have been in business in San Francisco twenty-five years, and in the present firm over twelve years.

Int. 2. Was the firm of Fox & Kellogg, if you have stated that as the style of the firm of which you are a member, in 1883 and earlier, owner in part of a mine in Mono County, California, known as the "May Lundy Mine," and of other mines, of which the late Frederic A. Pike, of Calais, Maine, was also part owner? Was your firm a party to certain agreements, concerning that mining property, made with one George W. Butterfield, of San Francisco, one dated Jan. 29, and the other dated July 31, both in the year 1883?

And is your firm the same whose name is to be found in those contracts?

Ans. The firm of Fox & Kellogg was, in and during 1883, and for three years prior thereto, owner in part of a mine in Mono County, California, known as the "May Lundy" mine, and also of a quartz mill, with mill site and other property appurtenant thereto, used in connection with said "May Lundy" mine. Frederic A. Pike, of Calais, Maine, was also part owner of the same mine and property, and he was also owner of two adjoining mines, but in the adjoining mines my firm had no interest. My firm was a party to the agreements concerning that mining property made with one George W. Butterfield, of San Francisco, one dated Jan. 29, the other dated July 31, both in the year 1883; and it is the firm whose name is to be found in those contracts.

Int. 3. Do you know said Butterfield? How long have you known him and how well?

Ans. I do know said George W. Butterfield, have known him since the summer of 1879, and had and have that degree of knowledge of him which one acquires by being brought into almost daily contact with him in business transactions during a continuous period of four or five years, with only three or four interruptions of a few weeks at a time, as was the case between him and myself.

Int. 4. When did you see said Butterfield first after July 31, 1883, and where? Did you, or not, see him on the twenty-ninth, and again on the thirtieth day of August, 1883?

Ans. I first saw said Butterfield, after the thirty-first day of July, 1883, at my office in San Francisco, on the thirteenth day of August, 1883. He was there again on the 15th of August, and spent most of the day at the office with me, until four o'clock P. M., when he started for the mine and was gone perhaps a week, when he returned, and I then saw him almost daily, and generally several times a day, always at my office, until the twenty-third day of October, 1883, when, according to my present recollection, he started East, and I did not see him again that year, except that I believe I met him once for a short time about the 12th or 13th of November, in the city of New York. I remember distinctly seeing him at my

office in San Francisco on the 29th, and again on the 30th of August, 1883.

Int. 5. If you had any conversation with said Butterfield on the twenty-ninth day of August, 1883, touching his contract of July 31 in that year with said Pike, please state fully what that conversation was, and especially what Butterfield said.

Ans. On the twenty-ninth day of August, 1883, he spent some time in the office. We were talking generally on the subject of his contract with Pike of July 31 of that year. I cannot give the whole conversation, but the question as to whom the deeds should run, which were to be made by Pike, Kellogg and myself, had been a subject of frequent discussion between us, and he had before that time instructed me to make our deeds run to himself, and on that day I remember asking him if he had instructed Pike on that subject, when he said that he had not particularly instructed him, and I suggested that he ought to do so, as, if not otherwise instructed, Pike might make his deed run to the English company to whom Butterfield was seeking to sell the property. Thereupon he directed me to write a despatch to Pike, which I did, in the words following, to wit:

"SAN FRANCISCO, Aug. 29th, 1883.

HON. F. A. PIKE, *Calais, Me.*

Make your deed to me, not to the Company."

This Butterfield signed in my presence and took it with him from the office.

Int. 6. If you had any further conversation, on Aug. 30, 1883, with said Butterfield, concerning his contract of July 31, 1883, with said Pike, please state fully what that conversation was, and especially what Butterfield said.

Ans. On Aug. 30, 1883, Butterfield was again in my office, and we again had a general conversation in reference to the contract of July 31, 1883, when Butterfield told me that he had sent the despatch to Mr. Pike, which I had written and he had signed the day before, and that that matter was all settled. He spoke confidently of being able to carry out his contract, and of this despatch as having been sent with that view, and at the same time asked me if there was not some further notice which he was required to give Mr.

Pike on that day, and I told him I knew of none, unless he was prepared to report the action of the Trust Company in the matter of delivering the bonds, to which he replied that he was not prepared to do that, for he did not know what the company would do about it.

Int. 7. Please state any notice whatever which said Butterfield ever gave you under said contract of July 31, 1883, and particularly whether he ever gave you any notice that the Union Trust Company of New York had declined to deliver to him the bonds, which are mentioned in said contract as to be delivered to him by said company. What intimation, if any, did said Butterfield give you that said contract had been rendered void by the declining of said Trust Company to deliver to, or for, said Butterfield such bonds? Please state all that he said to you on that subject at any and every time between July 31, 1883, and Jan. 1, 1884.

Ans. Mr. Butterfield never gave me any notice whatever under said contract of July 31, 1883, except the indorsements in writing which are made upon the contract of Aug. 15, 1883, a copy of which, with said indorsements, is annexed to this deposition, marked "Exhibit A," the indorsements being marked, respectively, "Exhibit B" and "Exhibit C," and particularly he never gave me any notice that, or to the effect that, the Union Trust Company of New York had declined to deliver to him the bonds which are mentioned in the contract of July 31 as to be delivered to him by said company, and never intimated that said contract had been rendered void by the declining of said Trust Company to deliver to or for him such bonds. On the contrary, he told me many times during the months of September and October, 1883, that he had never applied to the Trust Company to deliver the bonds, and should not do so until he had straightened up matters with Miller and Fogus, two men who were claiming some interest in the property adverse to the interest which Butterfield himself claimed to own, and not only admitted, but insisted that his contract of July 31 had not been forfeited, and could not then be forfeited, and that he should carry it out in good faith.

Int. 8. What other statements, if any, did said Butterfield make to you after July 31, 1883, and before Jan. 1, 1884, respecting

said contract of July 31, 1883, and when did he make such statements? What, if anything, did he say to you during that period respecting his applying to said Union Trust Company for a delivery to him of said bonds? Did you, or not, see him frequently during that period, July 31, 1883, to Jan. 1, 1884, and how late in 1883 did you see him in San Francisco? Were, or not, his conversations with you respecting said contract of July 31, 1883, frequent during that period while he remained in San Francisco, and when did he leave that city first after July 31, 1883?

Ans. In answer to the latter part of the last interrogatory I have stated substantially what was many times repeated to me by said Butterfield during the period mentioned, that is to say, between the 31st of July and the 23d of October, 1883. In none of his conversations did he ever say anything contrary to that which I have already stated, or make any pretence that he had ever made any demand upon or request to the Trust Company for the delivery of such bonds, or make any intimation that he intended or expected to do otherwise than to carry out in good faith his contract of July 31, or express any doubt of his ability to do it. At his request, the deeds of Mr. Kellogg and myself were retained in San Francisco for some time after they were executed and ready to be forwarded, and he stated that the reason he desired this delay was that he might close up with Miller and Fogus so as to send releases from them at the same time. I saw him, as I have before said, on the 13th and 15th of August; then he returned from the mine, and I saw him as early as the 23d or 24th of August, and from that time almost daily, and frequently several times a day, until the 23d of October, 1883, in San Francisco. Our conversations about this contract of July 31, 1883, were almost as frequent as our meetings. I had little faith in his ability to carry it out, and he was constantly trying to convince me of his ability and his intent to do so. My recollection is that he left San Francisco for New York or Boston on the 23d or 24th of October of that year.

Int. 9. If you entered into any agreement in writing with said Butterfield under said contract of July 31, 1883, please state when you so entered. Please annex such agreement, or a copy thereof, to your deposition given in answer to these interrogatories, and state

what you know of its execution, of the genuineness of the signatures thereto.

Ans. When Butterfield came to the office on the thirteenth day of August, 1883, he handed me a duplicate of the agreement of July 31, which he had made with Mr. Pike, and requested me to examine it, and that Mr. Kellogg and myself would accept the provisions of the same in proper form. I made a rough copy of it for our future reference, and studied it over, and when he came in on the fifteenth day of August we had some further conversation in reference to it, and then I prepared a contract of acceptance of its provisions on the part of Mr. Kellogg and myself, requiring that Butterfield should also unite in it, as shown by the contract itself. Butterfield and myself both executed it at the time, in triplicate, and I sent the three copies to Mr. Kellogg, who was then at the mine, for his signature. He executed it — all three of the copies — and returned them to me. One of the copies I preserved for our own use, one I gave to Mr. Butterfield, and the other I designed for Mr. Pike if he should ever have occasion to use it. They were all alike, exact copies of each other, and all executed by the genuine personal signatures of Mr. Kellogg, Mr. Butterfield and myself. The one retained by ourselves I still have in my possession, and a true copy of it is annexed to this deposition, marked "Exhibit A." I know the signatures to be genuine, because I made those purporting to be my own, saw Mr. Butterfield make those purporting to be his, and because I have personally examined the signature of Mr. Kellogg thereto, having seen him write his name more than a thousand times, and being perfectly familiar with his handwriting, and also because he has himself told me that his signature to this particular paper was made by himself.

Int. 10. If said agreement made by you with said Butterfield contains any indorsement thereon purporting to be by said Butterfield, please state what you know of the genuineness of the signature thereto, and by whom and by whose direction that indorsement was drawn, and when it was drawn and signed, so far as you know.

Ans. An indorsement was made on that one of the triplicates of

said agreement of August 15 which was kept by myself, and a true copy of such indorsement is annexed to this deposition, marked "Exhibit B," following said Exhibit A. It is without date, but I know that it was made on the twenty-fourth day of September, 1883. It was drawn by me at his request, and he signed it in my presence, and I know the signature to be genuine.

Int. 11. If there is any other indorsement on said agreement purporting to be signed by said Butterfield, please state all you know of the direction to draw and the drafting of said indorsement, and of the genuineness of the signature thereto. When was this last-mentioned indorsement drawn and signed? Please annex the same, or a copy thereof, to your deposition given in answer to these interrogatories.

Ans. On the second day after making the indorsement referred to in my last preceding answer, Mr. Butterfield came into the office, and asked me if I had yet forwarded our deed, and I told him no, but that I had dictated the letter to accompany the deed, and would forward it that day as soon as the letter was finished. He then said that upon reflection he would like to have us forward and deposit with it a former deed, which we had made and deposited with the New England Trust Company under the former contract, and which had then been returned to us. I told him to put his directions in writing, and I would comply, and thereupon, at his direction, I wrote upon the same instrument, upon which the preceding indorsement had been made, a second indorsement, which he read over and signed in my presence. A true copy of that indorsement is annexed to this deposition, following the exhibits before named, and marked "Exhibit C." I know the signature is genuine, for I saw him write it. The deeds were immediately forwarded and deposited in accordance with this request.

Int. 12. Please state whether you ever received from any one acting as agent or attorney of said Butterfield any notice of any action, or failure or refusal to act, on the part of the said Union Trust Company of New York, in the matter of the delivery of said bonds of the May Lundy Mining Company (Limited) to said Butterfield; please, when you received said notice and what was its

purport? If you received said notice in writing, please annex the same, or a copy thereof, to this, your deposition. If it was given to you orally, please state its exact words, or the substance of them, as near as you can.

Ans. No, I never received any notice from any one acting as agent or attorney of Mr. Butterfield, or otherwise, of any failure or refusal of said Union Trust Company to deliver said bonds. On the thirteenth day of November, 1883, I called at the office of said Union Trust Company in New York, and asked for a receipt for the deeds which I had forwarded to them, as mentioned in a former answer, and in conversation with Mr. King, who was, I believe, the then president or manager of that company, he informed me that Mr. Butterfield had never called for the bonds. I never received any information or intimation from any source that the Trust Company had ever refused to deliver said bonds, until some time in the month of February or March, 1885, when I was served with a copy of a com plaint in an action commenced by said Butterfield against myself and others in the Superior Court for the County of Mono in this State, which contained, among other things, an allegation that the said Union Trust Company had refused to deliver said bonds. This action was afterwards transferred to San Francisco for trial, and subsequently dismissed by plaintiff.

Int. 13. What communication, if any, in relation to the matter inquired of in the last before interrogatory, did you ever receive from Hall McAllister, attorney, of said San Francisco, in behalf of said Butterfield? What communication in behalf of said Butterfield did you ever receive from said McAllister, touching the contract between said Butterfield and said Pike of July 31, 1883, aforesaid?

Ans. The name of Hall McAllister's firm appeared upon the com plaint, referred to in my last answer, as of counsel for plaintiff, and he appeared as such upon argument of a demurrer to said complaint. I called his attention to the allegation in regard to the refusal of the Trust Company to deliver those bonds, and asked him if he had any knowledge on the subject, or had ever given Mr. Pike any notice of any such refusal, and he told me that he knew nothing about it, and had not given Mr. Pike any notice upon the subject, adding that he

knew nothing about the complaint, that it was not drawn in his office, and that he had not been consulted about it.

CHARLES N. FOX.

Attest: L. L. B. SAWYER, *Commissioner*.

EXHIBIT A, L. S. B. S., COM'R.

THIS MEMORANDUM OF AGREEMENT, made this fifteenth day of August, A. D. 1883, by and between Charles N. Fox and M. B. Kellogg, of San Francisco, California, of the one part, and G. W. Butterfield of the other part, witnesseth:

That the said Fox and Kellogg *assent to* and *accept* the *terms* and *conditions* of a *certain agreement* made *by* and *between* the said *G. W. Butterfield* and *F. A. Pike*, of Calais, Maine, dated July 31st, A. D. 1883, for and in reference to the sale of the May Lundy Mine, so called, and other property; and hereby agree to and will deposit their deed in escrow with the Union Trust Company of New York, to be held, delivered or returned according to the terms and conditions of said agreement of July 31st, 1883.

And the said Butterfield agrees to pay to the said Fox and Kellogg, in the manner and within the time mentioned in said agreement the sum of *sixty thousand nine hundred and fifty-eight dollars* ($60,958) as therein provided.

In witness whereof, the several parties hereto have hereunto subscribed their names, the day and year first hereinabove written.

G. W. BUTTERFIELD.
CHAS. N. FOX.
M. B. KELLOGG.

EXHIBIT B, L. S. B. S., COM'R.

The deeds under this agreement, and under the agreement with said Pike, are to be made to myself and deposited with the Union Trust Co. in escrow.

G. W. BUTTERFIELD.

EXHIBIT C, L. S. B. S., COM'R.

The deed of Messrs. Fox and Kellogg, made under this agreement, having been retained in their possession until this time at my suggestion, awaiting further advices, they are now requested to forward the same, and also, for further assurance and greater certainty, a former one dated January 28th, 1883, which was originally deposited with the New England Trust Co., both to the Union Trust Co. to be deposited in escrow under the terms of this agreement.

Dated Sept. 26, 1883.

G. W. BUTTERFIELD.

EVIDENCE FOR DEFENDANT, MARY H. PIKE.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED, BEFORE ME,

JOHN G. STETSON, *Examiner.*

DEPOSITION OF THOMAS H. TALBOT.

Direct Examination by JOHN LOWELL, Esq., *of Counsel for Defendant*, MARY H. PIKE.

BOSTON, April 4, 1888.

Int. 1. Please state your name, and what your relation is to this suit.

Ans. Thomas H. Talbot; I was counsel for Frederic A. Pike in a case relating to the notes, of which one is in controversy here, from the commencement of the suit. Since Mr. Pike's death, I have been of counsel for his representative in that suit, and of counsel for the same interest in several other suits, and I am of counsel in this suit for the defendant, Mary H. Pike.

Int. 2. On page 86 of the record is found a copy of a submission to Judge Hoar of certain matters in controversy between Charles A. Gregory and Frederic A. Pike, signed by Mr. Brooks for Mr.

Gregory and by you for Mr. Pike: had you any authority from Mr. Pike to sign said submission or to enter into any arbitration concerning the matters therein submitted?

Ans. I had not.

Int. 3. Can you tell me when Frederic A. Pike died, when his will was submitted to probate, and his widow, Mary H. Pike, was appointed executrix?

Ans. Mr. Pike died Dec. 2, 1886; his will was approved, and Mrs. Pike appointed executrix in March, 1887, and I think the first day in March, by the Probate Court, she having been named as executrix in the will.

Int. 4. Mr. Gregory has said in his deposition that he understood Mr. Pike was acting partly for himself and partly for others in relation to the note in controversy and the moneys for which it was pledged to him: can you name those persons?

Ans. They are the persons named by Mrs. Pike in her answer on page 18 of this record.

Int. 5. On page 89 of the record is a copy of a paper purporting to be an award of Judge Hoar under the submission before mentioned: will you state any facts within your knowledge tending to show the circumstances under which that paper was written, and whether or not it can be properly considered an award?

Ans. In the week which ended on Dec. 18, 1886, and, I think, on Thursday, the 16th, Mr. Gregory and myself called at the office of Hon. E. R. Hoar to leave with him the last briefs in the case, and Mr. Gregory wrote a note to Judge Hoar, which was signed by him and myself, and left with him. I have that paper in my hands, handed me by Mr. Brooks at this moment, and it read as follows:—

"Hon. E. R. Hoar, Referee, etc.:

Dear Sir, — We desire a decision in the case of Gregory *v.* Pike, and we wish before you frame the award in formal shape that we may be both heard as to that precise shape.

Yours, etc.,

T. H. TALBOT,
C. A. GREGORY,
for self and
F. A. Brooks."

On Saturday, the 18th, at one o'clock, at the request of Judge Hoar, I went with Mr. Brooks and Mr. Gregory to his office. Judge Hoar then stated that he had received the request above recited, not to give his award final shape until the parties had been heard as to its final shape, as a reason why he should not make the final award at that time. He then went on and announced the conclusions which he had reached, in substance, that the notes should be retained by Pike only for the purpose of securing the amount due on what was known in that case as the Eaton note, otherwise they belonged to Gregory. There arose then some question as to the rate of interest which was due upon the Eaton note, and Judge Hoar desired to be made certain as to the law of the State of Maine on that subject, and as to the law of which State would govern in that matter. This could not be determined then and there, as we could not ascertain what was the law of Maine in force July 31, 1883. Judge Hoar's statement of his conclusions reached was oral, apparently not from a written memorandum even, and he gave us an opportunity to be heard in the next week on the final shape of the award as well as upon the foregoing question as to interest.

On Monday, the 20th, the request of Swift, the promisor in the two notes in question, for an injunction against myself and Gregory to prevent the collection of those notes, was set for hearing in the Circuit Court, first at 11 A. M. and afterwards at 2 P. M., and Mr. Brooks and I were in attendance at or near each of those hours. At the later hour Mr. Brooks told me that, in view of this application of Swift for an injunction, he had represented to Judge Hoar that it was important that there should be an actual award in existence, and had himself drawn up such award and taken it to Judge Hoar; that thereupon Judge Hoar had signed the award thus drawn up. Later in the afternoon Mr. E. B. Harvey, of Calais, Me., who had been attorney for Mr. Pike in general, and myself called at Judge Hoar's office to see said award. Judge Hoar was not in, and we were not allowed to examine it, Mr. Sullivan, in charge of Judge Hoar's office, not knowing that Mr. Brooks had seen it.

On the 21st, Mr. Harvey and myself called at Judge Hoar's office and saw him, and he then said [*Mr. Brooks objects to any statements*

of Judge Hoar.] that the award was not to be binding as an award until Pike's counsel should be heard in relation to it, as requested in the written request of Dec. 16.

On the 24th of December, 1866, the original paper, marked "Exhibit A," on page 18 of this record, early in the morning was handed to Judge Hoar. Later on the same day Mr. Brooks and I received a notice from Judge Hoar asking us to call upon him together. At my office in School Street, an arrangement had been made between Mr. Brooks on one side and Judge Lowell, Mr. Harvey and myself on the other, for taking these notes out of the hands of Judge Hoar, and transferring three of them to the custody of Mr. Stetson, as was afterwards done, as shown by Exhibit B on page 18 of this record. Mr. Brooks and I left my office together to go to Judge Hoar's office to get the notes and to answer his call. My recollection is that Judge Hoar began the conversation [*Mr. Brooks objects to the giving of any statements by Judge Hoar.*] and that he mentioned or alluded to his having received a notice of the revocation of the submission, and expressed a wish to get rid of the papers and notes. His fees were to be paid jointly, and before leaving my office our half of them had been placed in Mr. Brooks's hands. When we asked Judge Hoar what his charge would be, he said he didn't like to take any fee at all where his work would not do the parties any good. We insisted upon paying, and Mr. Brooks paid him. We then asked him for the notes, and he handed them to Mr. Brooks, and Mr. Brooks handed them to me, and I kept them until I delivered them to Mr. Stetson, under the agreement between me and Mr. Brooks. My recollection is that I then gave up to Judge Hoar the receipt which I took from him when I placed the notes in his hand. Judge Hoar then handed the award to me. I said that I didn't want it, and he handed it to Mr. Brooks. Judge Hoar again spoke of the award, and said, "Of course I cannot make any alteration in it now, in view of the notice of revocation." From Judge Hoar's office Mr. Brooks and I went to Mr. Stetson's office immediately and delivered to him the notes and took his receipt therefor,—Exhibit B, before mentioned.

Int. 6. The submission, beginning on page 86, appears on page

88 to be dated Nov. 30, 1886: when was it in fact signed and when delivered to Judge Hoar, if you remember?

Ans. It was not made nor signed on Nov. 30; it was made and signed possibly as late as Dec. 2, 1886; but my recollection is that it was made and signed on Dec. 1, 1886.

Int. 7. Can you recall anything that was said to Judge Hoar when the notes were first handed to him, and by whom, and in whose presence?

[*Objected to as immaterial and incompetent.*]

Ans. I can; I have a distinct recollection of that. It was, as near as I can recollect, on Dec. 2, 1886. Mr. Gregory and I went together to Judge Hoar's office to give to him the printed record in that case, No. 2,170, and I was to hand him the notes in controversy, as agreed in the submission. In Mr. Gregory's presence, before I handed the notes to Judge Hoar, I said to him that there is, in that suit then pending in the Circuit Court, another claimant besides Mr. Gregory, and in any delivery which you are to make of these notes as arbitrator you must not do anything to compromise me in my duty as attorney of that court to hold these notes subject to its control until the rights of the claimant Kemp are disposed of in some way. Judge Hoar assented to that condition, and then I handed him the notes.

Int. 8. In the answers which you have given, excepting the first and the last, have you had the advantage of a memorandum made by you Dec. 24, 1886, as to the facts stated in those answers?

Ans. I have had before me in giving this deposition a memorandum which I made Dec. 24, 1886; but in stating what took place at the interview in which Judge Hoar delivered the notes to Mr. Brooks and myself, I have stated some things not in the memorandum, but the words attributed to Judge Hoar, beginning, "Of course I cannot now make any alteration in it," etc., are in the memorandum.

Cross Examination by FRANCIS A. BROOKS, Esq., *of Counsel for Complainants.*

Cross-Int. 9. Did not you and I, after learning of the critical illness of Mr. Pike, in the latter part of November, 1886, agree that it was expedient for both Gregory and Pike to have the mat-

ter in controversy between them referred to arbitration, and did we not write two letters to Mr. Pike together, making such recommendation to him, some days before the execution of the submission by us?

Ans. On Nov. 29, 1886, Mr. Brooks read to me a letter addressed to Mr. Pike making such a recommendation as the question suggests, and I wrote another letter, concurring in that recommendation, to go with his to Pike.

Cross-Int. 10. Were you at that time in possession of the two Swift notes as the attorney or representative of said Pike?

Ans. I was.

Cross-Int. 11. Had you not in April, 1886, brought an action at law in the name of Charles F. Jones against W. C. N. Swift in this court to recover the amount of the note for $20,334.60?

Ans. I had.

Cross-Int. 12 Had not that suit progressed so that judgment had been rendered therein for plaintiff, Dec. 16, 1886, as set forth at page 29 of this record, containing the docket entries in that suit?

Ans. My recollection agrees with the statement in the record. I had pressed the suit for judgment.

Cross-Int. 13. Had not Mr. Brooks joined you in behalf of Gregory in the same suit in pressing it for judgment?

Ans. Mr. Brooks had aided me to the extent of his power in that suit and had appeared in court with me. He had appeared specially to satisfy Judge Carpenter that Gregory's claim upon the note in suit 2,170 would not be prejudiced by judgment on the note in the action at law.

Cross-Int. 14. In going before Judge Hoar, under the submission to him as referee above mentioned, was not Judge Hoar in the first instance informed of the fact of the dangerous illness of Mr. Pike, one of the parties to the submission, and the improbability of his recovery, and told or given to understand that the submission would be of no avail in case of his death unless it should be approved, adopted or ratified, by his legal representatives, and that it was expected that, in case of the death of said Pike, it would be so adopted, approved and ratified?

Ans. Judge Hoar was informed of the dangerous illness of Mr.

Pike and of the improbability of his recovery. I have no recollection that Judge Hoar was given to understand by Mr. Brooks or myself that the submission would be of no avail without approval of his legal representatives in case of his death, or that such ratification was expected. On the other hand, Judge Hoar's intimations to that effect were of his own motion; at least this is my recollection.

Cross-Int. 15. Do you doubt that Judge Hoar understood the state of things to be as stated in my last question?

Ans. I have a distinct recollection that when we went to Judge Hoar's office on the morning, I should now say, of Dec. 2, 1886, Judge Hoar said, "What kind of fellows are you, coming here and trying to act for a dead man?" I think Mr. Brooks was present when this was said, but the remark may have been addressed wholly to me; and he had said something like it the day before. At the time Judge Hoar put the question above, Mr. Pike's death had been announced in the morning papers, —

[*Mr. Brooks here states that he objects to any further answer irrelevant to the inquiry.*]

— and this prevents me from stating positively that this was on the 2d of December.

Cross-Int. 16. Do you mean to say that you had heard of the death of Pike on the morning of Dec. 2, 1886?

Ans. I am not willing to say that positively, and yet it lay that way in my memory when I answered the last question.

Cross-Int. 17. How does it lie in your memory now?

Ans. Uncertainly; but I still have some recollection that we heard of Mr. Pike's death on the day it took place, — I mean on the morning of that day.

Cross-Int. 18. In what way, according to your memory, could you have got or did you get this information almost as soon as his death took place, he being in Calias, Me., and you being in Boston?

Ans. Upon reflection, that seems improbable, and my memory, which I stated before, is very likely incorrect as to the date.

Cross-Int. 19. Had not the hearing before Judge Hoar as referee actually begun before the information of Mr. Pike's death was received by you in Boston?

Ans. After refreshing my recollection, I state that it had.

Cross-Int. 20. You say Mr. E. B. Harvey, of Calais, Me., was the legal attorney of Mr. Pike in his lifetime: was he not the legal attorney of Mrs. Pike as executrix under the will of her husband, deceased?

Ans. He has so stated to me, and I have consulted with him as such.

Cross-Int. 21. After entering into this submission, as you did, in the name of Mr. Pike in his lifetime, and after learning, as you soon did, of the death of Mr. Pike, did you communicate with any one as Mr. Pike's legal representative in relation to the course to be pursued by you before the arbitrator in the matter of the submission? If so, state when and with whom, and what reply you received, if any.

[*Objected to, if the communications are in writing.*]

Ans. On the evening of Friday, Dec. 3, 1886, I wrote to Mr. Harvey. I have not this letter, or a copy of it, and do not remember its contents.

[*Adjourned.*]

APRIL 5, 1888.

[*Answer continued.*]

I have in my hands a letter from Mr. Harvey, dated Calais, Me., Dec. 8, 1886, the first two paragraphs of which are as follows: —

"BR. TALBOT: I received your letters of 3d and 4th inst. Your course meets the approval of the parties interested, so far as I am able to confer with them. F. H. Todd's sons have the same interest as Mr. Pike, and they together are over half.

Mrs. Pike is executrix, and I am fully empowered to speak and act for her by the direction of Mr. P. So whatever the decision, you can consider that your submission to Judge Hoar is considered as well as you could do, — we of course being obliged to judge from the information you give us as to the state of the case."

This is all the communication touching the special matter treated in this extract, which I now recollect or have found.

Cross-Int. 22. In answering the last interrogatory you held in your hand a letter consisting of several sheets or pages of written matter, and read therefrom the first two paragraphs only, if I am not mistaken. Will you either permit me to read the rest of that letter or read it yourself, in order that I may know the entire contents of the same?

Ans. I respectfully decline to permit Mr. Brooks to read the letter or to read it myself.

Cross-Int. 23. Does not the remainder of the letter, that is, the part not read by you, contain references to the matter which had been submitted to the arbitration of Judge Hoar by you in the lifetime of Mr. Pike, in regard to which matter, the writer, Mr. Harvey, stated in the paragraphs read by you that he was fully empowered to speak and act for Mrs. Pike as executrix of the will of F. A. Pike by the direction of Mr. Pike himself?

Ans. The remainder of the letter was not shown, nor were its contents stated to Mr. Gregory, and I decline to state anything relating to them for that reason.

Cross-Int. 24. If I understand your answer, you decline to state whether parts of the letter not read by you in your twenty-first answer contain any references or allusions to the question then pending before Judge Hoar as referee as to the ownership of the two Swift notes on the ground that you have already set forth in your twenty-first answer so much of the contents of this Harvey letter as was read or stated by you to Mr. Gregory. Have you any other reason for declining to read or show to me the whole contents of this letter?

Ans. I have.

Cross-Int. 25. Your reason for declining to read or show the contents of the whole letter is not because the rest of the letter does not relate to the question or questions then pending before Judge Hoar as referee under the submission, is it, but is because it does relate to the matter then pending or being heard before Judge Hoar as referee under the submission, is it not?

Ans. My reason for declining is that the letter is in the nature of a confidential communication between client and counsel, and I decline, in the absence of my client, to betray that confidence. I have made an exception to this rule as to that part of the letter which I published to Mr. Gregory, and I decline to go any further, except under the order of the Court.

Cross-Int. 26. Do you admit or deny that the portions of the letter not already read by you relate to the course to be pursued in

the conduct of the hearing before Judge Hoar as referee under the submission?

Ans. I do not admit or deny.

Cross-Int. 27. Do you mean that you refuse to admit or deny what was suggested in the last interrogatory to you?

Ans. I mean that I refuse.

Cross-Int. 28. You mean, if I understand you, to say that you refuse to answer categorically or definitely Cross-Ints. 26 and 27, just put to you?

Ans. I do not mean that; I have answered those interrogatories categorically and definitely.

Cross-Int. 29. Not being able to perceive that you have answered these preceding interrogatories in any other way than by declining to answer them definitely or directly, and it appearing to me that you are not attempting to make any such definite and direct answer to these interrogatories, I will again ask you to make an answer to the same, either in the affirmative or the negative, so that we may understand from you whether or not the unread contents of the Harvey letter relate in any way to the matters or questions then pending before Judge Hoar as referee.

Ans. The unread contents of the Harvey letter do not in any way relate to the matter of authorizing or ratifying the submission to Judge Hoar, and beyond that I definitely decline to make any statement as to those contents or to produce the letter for inspection as to such contents.

Cross-Int. 30. Were you not requested by me seasonably before the taking of this deposition to produce this letter at your examination as a witness in this case, so that the same might be used as part of your deposition or in connection therewith?

Ans. Mr. Brooks certainly as early as the 2d instant asked me to look up this letter. He may have intended the use which his question suggests. I understood that I was to inspect it for the purpose of testifying upon the question of authority or ratification of the submission.

Cross-Int. 31. Did not Mr. Brooks, yesterday forenoon, for a second time, ask you to have this Harvey letter present at the time of

giving your deposition in this case, which was then set for yesterday afternoon, and did he not urge you to go or send to Brookline, where you supposed the same was, in order to procure the same in season to be used at the taking of your deposition as evidence in this case, and did he not say that you would have ample time to go to Brookline and return before the taking of your deposition, so that you could have the letter for production and inspection at the time of taking your deposition? Did he not say to you at one time that he thought that the production of this letter by you as evidence might not be objectionable to you, or to that effect, and did he not in precise terms verbally notify you to produce the same, meaning at the time and place of your proposed examination as a witness in this case?

Ans. I have no recollection of the notification in precise terms which the question calls for. To the rest of the question I answer generally in the affirmative, although my recollection on the matter is not so definite as that of Mr. Brooks appears to be, by the question.

Cross-Int. 32. I now repeat the call upon you to produce this Harvey letter of Dec. 8, 1886, that the plaintiffs may have the benefit of the same as evidence in this case and not of the part merely of said letter as read by you. Will you produce the same?

Ans. I again respectfully decline to produce it.

[*Adjourned.*]

APRIL 7, 1888.

[*Mr. Brooks, of counsel for complainant, says: In view of the refusal of the deponent to make answer to the cross-interrogatories of plaintiffs' counsel, and the consequent inability of the plaintiffs to obtain the benefit of a thorough cross examination of the deponent, the plaintiffs are unable to proceed further with the witness, as they desire to do, and now give notice that they will, at the hearing of this cause by the Court, apply to the Court to have this deposition suppressed or rejected as evidence for the defendant, Pike.*

Mr. Lowell, for the defendant, Pike, says that, when the taking of this deposition was adjourned on the 5th of April, it was in order to enable the plaintiffs' counsel to submit to the Court the question whether the Harvey letter ought to be produced. We are ready to

produce it now, or at the hearing, or at any time, if the Court shall so order. We have also offered to admit, and do now admit, that it contains a discussion of the merits of the case as between Harvey as client and Talbot as counsel, with the implication that this argument should be submitted by Mr. Talbot to Judge Hoar as referee. This is the fact which Mr. Brooks has repeatedly said he wished to prove by this letter. The details of the argument we do not think he is entitled to have.]

Direct Examination resumed.

Int. 33. You have said in your cross examination that a letter of Mr. Brooks's and another of yours were sent Nov. 29, 1886, to Frederic A. Pike, at Calais, Me. Have you any reason to know whether Mr. Pike ever read these letters or either of them?

Ans. I have reason to know that he never read either of them; that he was sick unto death when they were written, and also when they reached Calais. I received, Dec. 1, 1886, or the following day, the telegram, which I produce, as follows: —

"CALAIS, ME., Dec. 1.

To. THOMAS H. TALBOT, *Boston:*

Mr. Pike sick unto death; other parties here interested. Can you postpone without injury to case and come here and consult? Answer.

E. B. HARVEY."

[*It is agreed that this telegram was called out by the two letters mentioned in the question.*]

Int. 34. Did you go to Calais to consult, as requested in that telegram?

Ans. I did not.

Int. 35. Did you personally or by letter communicate with others than Mr. Harvey, and receive instructions from them with regard to the reference to Judge Hoar before it was concluded?

Ans. I did not.

Int. 36. Mr. Gregory has testified that you either showed him or read him or stated to him the contents of a letter from Mr. Harvey giving you authority to proceed with the reference. What do you remember about that, if anything?

Ans. I have no recollection whatever of having shown to Mr. Gregory or read to him or stated to him any letter or extract from a letter from Harvey in approval or ratification of the submission except the extract which appears in my answer to Cross-Int. 21. On the other hand, my recollection is that I did not. In saying this, I do not mean to deny that I may have said something to him about the telegram of Dec. 1, 1886, hereinabove mentioned.

Int. 37. Mr. Gregory's recollection is that Mr. Harvey in this letter said he had authority from all parties interested: did you ever receive a letter containing any such statement by Mr. Harvey?

Ans. My recollection is that I never received any such letter, and since Mr. Brooks called on me on the 4th instant, I have examined my files, and have found no such letter.

Int. 38. Have you any reason to know or suppose that Mr. Harvey was ever authorized except as stated in the extract already produced and so often referred to?

Ans. I have none whatever.

THOMAS H. TALBOT.

Attest: JOHN G. STETSON, *Examiner.*

STIPULATION.

It is hereby agreed between the plaintiffs and the defendant, Mrs. Pike, that the amount of the Eaton note which was paid to Mr. Talbot Jan. 4, 1887, was received by said Talbot as the attorney of said Eaton, and not in his capacity of attorney for Mrs. Pike. The question of the lien of Eaton on the Swift notes, or of F. A. Pike on behalf of Eaton, was presented to Judge Hoar as referee by Mr. Talbot, and argued by him. Mr. Talbot was at that time retained by Mr. Eaton. In the hearing before Judge Hoar it did not appear that Mr. Talbot represented any one but F. A. Pike or his representative, unless it might be inferred from his urging the Eaton claim.

F. A. BROOKS,
for plaintiffs.
J. LOWELL,
for MRS. PIKE.

BOSTON, April 7, 1888.

STIPULATION.

[Filed April 26, 1888.]

At the final hearing of the above-entitled suit, it is not to be questioned or denied by either party that E. B. Harvey, Esq., of Calais, Me., upon the decease of Frederic A. Pike became at once the lawful attorney in fact of Mary H. Pike, who was named as executrix under the will of said Frederic A., and that as such attorney the said Harvey was by said Mary H. authorized to write the letter to T. H. Talbot, an extract from which is printed on page 222 of this record, and that said Talbot had authority to and did represent said Mary before the referee, Judge Hoar.

And it is not to be questioned or denied by either of the said parties that the said Harvey was duly authorized by the said Mary H. to write and deliver to the arbitrator, Judge Hoar, the letter which he did write and deliver to him on the twenty-fourth day of December, 1886, a copy of which, marked "Exhibit A," is annexed to the answer of the defendant Pike at page 18 of the record.

On the part of the plaintiffs, it is also agreed, if the fact be material, that on the ninth day of April, 1883, the plaintiff Gregory placed in the hands of George W. Butterfield two notes of $20,334.60 each, signed by W. C. N. Swift, dated April 4, 1883, one being payable in two years from date, and one in three years, and took from said Butterfield a receipt therefor in the words and figures following: —

"New York, April 9th, 1883.

I hold in my hand notes of W. C. N. Swift, dated New Bedford, Mass., 1883, 4m. 4th, one due two years after date for $20,334.60, one due three years after date for $20,334.60, payable to order of Geo. W. Butterfield, with interest at six per cent. per annum. These two notes belong to Chas. A. Gregory, and the proceeds of them, and I agree to deliver the same to him upon request, or the full amount of money expressed therein, and I also owe an account and payment to said Gregory for $730.80, being his pro rata of the two other notes of similar description held by me belonging to J. C. Kemp. Gregory is entitled to one half of this $730.80 in two years and one half in three years, with interest as above.

G. W. BUTTERFIELD."

And that said notes were by said Butterfield transmitted to the plaintiff Jones, and were by said Jones surrendered to the maker, Swift, in exchange or substitution for new notes drawn payable to said Jones, one of which, dated April 20, 1883, for the sum of $20,334.60, is the subject matter of this present suit, and is one of the two notes delivered to Frederic A. Pike, July 31, 1883, by either Butterfield or Jones, or both of them.

F. A. BROOKS, *for Plaintiffs.*
J. LOWELL, *for Defendant*, Mary H. Pike.

RECORD OF THE CASE.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Before

THE HONORABLE THOMAS L. NELSON,
District Judge.

No. 2424, EQUITY.

CHARLES A. GREGORY ET AL.

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL.

The bill of complaint (see page 1) in this cause was filed in the clerk's office on the second day of August, 1887; the answer of the Boston Safe Deposit and Trust Company (see page 6) was filed Sept. 30, 1887, and complainants' replication thereto (see page 7) Oct. 15, 1887; the answer of the Merchants National Bank of Boston (see page 7) was filed Sept. 30, 1887, and complainants' replication thereto (see page 3) Oct. 15, 1887; the answer of Mary H. Pike, executrix, (see page 9) was filed Dec. 8, 1887, and complainants' replication thereto (see page 18) Dec. 24, 1887. This cause was entered at the May term of this court, A. D. 1887, when the parties appeared by their respective attorneys, and was continued from term to term to this present May term, A. D. 1888, when, the Honorable Le Baron B. Colt, circuit judge, sitting, this cause came on to be heard upon the aforesaid pleadings, and the stipulations filed therein (see pages 19, 227 and 228), and the evidence (see pages 22 to 239, inclusive)

introduced under said stipulations, and was argued by counsel for the complainants and for the defendant, Mary H. Pike, executrix, and thereupon the following final decree is entered:—

FINAL DECREE.

[Oct. 5. 1888.]

This cause came on to be heard at this term, upon the pleadings and proofs herein, and was argued by counsel for the complainants and for the defendant, Mary H. Pike, executrix; and thereupon, upon consideration thereof, it is now, to wit, Oct. 5, 1888, ordered, adjudged and decreed that the bill of complaint herein be and the same is hereby dismissed, with costs to be duly taxed.

By the Court,

John G. Stetson, *Clerk*.

From this decree the complainants, in open court, claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good; and said appeal is allowed by the Court.

A true record:

Attest: JOHN G. STETSON, *Clerk*.

COPY BOND TO PARTY ON APPEAL.

Know all men by these presents, that we, Charles A. Gregory, of Chicago, Illinois, and Charles F. Jones, of Philadelphia, Pennsylvania, as principals, and Frederick W. Gregory, of the city of Boston, and John Brooks, of the city of Cambridge, as sureties, are held and firmly bound unto The Boston Safe Deposit and Trust Company, The Merchants National Bank, corporations located respectively in the city of Boston, Massachusetts, and Mary H. Pike, of Calais, in the State of Maine, in the full and just sum of six hundred dollars to be paid to the said obligees, their certain Attorneys, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the sixth day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at the May term. A. D. 1888, of the Circuit Court of the United States for the District of Massachusetts, in a suit in equity, depending in said court between said principal obligees as plaintiffs and said obligees as defendants, a decree was rendered against the said Gregory and Jones, the plaintiffs in said suit; and the said Gregory and Jones, plaintiffs, having obtained an appeal, in open court, to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and admonishing said defendants to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October current:

Now the condition of the above obligation is such, that if the said Gregory and Jones shall prosecute their said Appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of Alfred D. Hall.

CHARLES A. GREGORY AND
CHARLES F. JONES,
By their attorney in fact, F. A. BROOKS. [L.S.]
FREDERICK W. GREGORY. [L.S.]
JOHN BROOKS. [L.S.]

Approved:
LE BARON B. COLT,
Circuit Judge.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

I, John G. Stetson, Clerk of the Circuit Court of the United States, for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record of the Circuit Court in the cause in equity entitled:—

No. 2424.

CHARLES A. GREGORY ET AL., COMPLAINANTS,

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL., DEFENDANTS,

in said Circuit Court determined, and that annexed hereto is a true

copy of the opinion of the court in said cause, in accordance with which the final decree therein was entered.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[SEAL] JOHN G. STETSON, *Clerk*.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2424.

CHARLES A. GREGORY ET AL.

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL.

OPINION OF THE COURT.

[OCTOBER 5, 1888.]

COLT, J. In 1881, George W. Butterfield sold certain mining property to Frederic A. Pike, of Calais, Maine. Early in 1883, Butterfield became desirous of getting the same property back again. He associated himself with one Charles F. Jones. A contract of purchase was made with Pike January 29, 1883, and Jones made the first cash payment under it. Shortly after this, Butterfield and Jones entered into negotiations with the plaintiff, Charles A. Gregory, and J. C. Kemp van Eé as persons who could help furnish the requisite means to carry out the contract with Pike. To raise the money, Gregory and Kemp transferred to Butterfield 160,000 shares of the Great Sierra Consolidated Mining Co. These shares Butterfield, early in April, 1883, sold to W. C. N. Swift, of New Bedford, Mass., receiving $10,000 in cash and four notes amounting to over $80,000. These notes were made payable to the order of

Butterfield and were negotiable. On April 9, two of these notes were delivered by Butterfield to Gregory and on the same day Gregory passed the notes back again to Butterfield, who delivered them to Jones, as Butterfield, Gregory and Kemp sailed that day for England to look after the sale of the mining property covered by the contract of purchase with Pike. On April 20, Jones surrendered to Swift the four negotiable notes and took in return from Swift five other notes payable to the order of Jones, three of which were non-negotiable. It is one of these latter notes, amounting to $20,334.60, which is in controversy in this suit.

Under the contract with Pike it became necessary to sell the property before July 30, 1883. This was not accomplished, and Butterfield, who had returned from Europe, went with Jones to Calias; and, on July 31, made a second contract with Pike, extending the time for selling the property to January 1, 1884. The body of this agreement called for a cash payment of $25,000, but there was appended at the end of the paper the following modification, "For the first payment of $25,000 specified in the above agreement, the said Butterfield has lodged in the hands of said Pike the notes of W. C. N. Swift, of New Bedford, dated April 20, 1883, for $15,000 and $20,334.60, payable in two and three years from date, which notes are to be held by said Pike until January 1, 1884, unless sooner redeemed by said Butterfield by the payment of $25,000, and at that time the said Pike is authorized to raise $25,000 out of them by pledging them on the most favorable terms he can obtain." In December, 1884, Gregory brought suit against Pike and Swift in the State Court of Massachusetts for the possession of these notes. This suit was removed to the Circuit Court of the United States in 1885, and is No. 2,170 of causes in equity. Subsequently the court allowed Kemp and Butterfield to become parties

to the suit. Under a stipulation dated November 13, 1886, Gregory and Pike, through their respective counsel, submitted the questions raised in the equity suit to the Hon. E. R. Hoar for determination. The award of Judge Hoar purports to be dated November 30, the time of the submission, though the date when the award was made appears by the evidence to have been December 20. He found the plaintiff Gregory entitled to the two Swift notes upon the payment of a certain note for $2,437.50, signed by Butterfield and Jones and payable to the order of C. H. Eaton. At the time of the negotiation of July 31 with Pike, it became necessary to free the mining property of a mortgage to Eaton. Pike agreed to hold the Swift notes as collateral for the payment of the note given Eaton, as well as for the payment of the $25,000 called for by the contract. In consideration of this note and acceptance by Pike, Eaton discharged his mortgage on the property. Pike died December 2, 1886, and Mrs. Pike became executrix under his will. On December 24, 1886, through her attorney, E. B. Harvey, she notified Judge Hoar that she revoked the submission made to him as arbitrator, and on the same day the two Swift notes were surrendered by the referee and passed into the hands of John G. Stetson, Clerk of the Circuit Court, to be dealt with as the counsel for Gregory and Mrs. Pike might jointly direct.

In April, 1886, an action at law was brought against Swift in the name of Charles F. Jones, the nominal payee, ~~but really in the interest of Pike,~~ on his note for $20,334.60. Judgment was obtained and the amount of $24,926.90 was paid into Court in full satisfaction of the judgment and interest thereon, and the note cancelled. By order of the Court, January 10, 1887, this amount was transferred to the equity cause of *Gregory* v. *Pike et al.*, pending in this Court. The present suit is brought by Gregory and Jones against the

Boston Safe Deposit and Trust Co. and the Merchants National Bank, where the money derived from the Swift judgment was deposited, and also against Mrs. Pike, and the bill prays that the funds in said banks may be paid over to the said Gregory.

The first point we have to decide is whether the submission to Judge Hoar is binding upon the parties to it. There is one objection taken which is fatal to this award. The submission purports to be a submission of the equity cause then pending in the United States Circuit Court, and that cause is referred to and of necessity made a part of the submission. In that cause there were other parties besides Gregory and Pike, and a submission, whether by rule of court or otherwise, without the assent of these other parties whose interests might be affected, was irregular and void.

"If a submission be entered into in a pending cause, or if a reference is undertaken to be made by agreement of parties, all persons who are parties of record to the suit must unite equally whether they are mere nominal parties or really interested."

Morse on Arbitration, 33; *Owen* v. *Hurd*, 2 Durn. & East, 643; *McCarthy* v. *Swain*, 145 Mass. 471.

Again, Mr. Pike died pending submission which would ordinarily operate as a revocation.

"The most familiar case in which it (revocation in law) takes place is where one of the parties dies pending the arbitration. As a general rule this occurrence is a revocation of the arbitrator's authority."

Morse on Arbitration, 233; *Marsailles* v. *Kenton*, 17 Penn. St. 238; *Dexter* v. *Young*, 40 N. H. 130.

On December 24, Mrs. Pike gave formal notice to Judge Hoar that she revoked the submission. While Mr. Brooks, as representing Gregory, was anxious to obtain some kind of an award from Judge Hoar after he expressed

his opinion orally on December 18, yet upon the evidence it would seem that the arbitrator was to hear counsel further, and it may well be doubted whether he intended to make any final award before the notification of December 24. He seemed anxious rather to surrender the papers on the ground that, after what had taken place, his work would not do the parties any good; and the notes in fact, it will be remembered, were surrendered to counsel for both parties and by them lodged in Mr. Stetson's hands.

Upon this state of facts I do not think the submission binding upon either party.

We come now to the merits of the controversy, and the first question is whether Pike's estate, as against Gregory, has any interest in this Swift note, or its proceeds now in the registry of the Court. Gregory contends in the first place that he is entitled to the note because neither Butterfield nor Jones had any authority to pledge it to Pike; and, second, that if they did have authority to pledge, Pike, by his failure to carry out the terms of his contract, has lost whatever rights he may have had.

With respect to the first proposition, I do not think that as against Pike, an innocent pledgee for value, Gregory can claim ownership of this note. Gregory, Butterfield and Jones were engaged in a joint undertaking to sell on the London market the mining property contracted for with Pike. Pike's first contract with Butterfield was in January, 1883, and the contract of July 31 was a renewal upon different terms. In the spring of 1883, in furtherance of this scheme, Butterfield sold for Gregory and Kemp certain mining stock to Swift, who paid for the same in cash and notes. These notes were negotiable and were made payable to the order of Butterfield, and Gregory passed over his two notes to Butterfield. It became necessary now to raise some money on the

Swift notes, and so they were passed over by Butterfield to Jones for that purpose with the consent of Gregory. Jones, saw Swift and exchanged these notes, together with the two belonging to Kemp, for five other Swift notes payable to Jones three of which were non-negotiable,—it is one of the latter notes which is now in controversy.

From Gregory's own statement it seems he did not know Jones had exchanged the original Swift notes which were negotiable for others, which were not, and, therefore, he must have believed that Butterfield or Jones had the power to dispose of them to Pike, if they found it necessary. The fact that Butterfield, on August 4, cabled Gregory, asking if he should use note and that Gregory replied that his interest must be increased if note was used, the reply by Jones that they must adhere to original contract, and the subsequent answer by Gregory forbidding use of note except his interest should be increased, cannot it seems to me change the position of an innocent party like Pike, in view of the whole situation, and of the subsequent conduct of Gregory. Butterfield swears that before leaving London Gregory, being a partner with him, gave him authority to use the Swift note if it should become necessary, but to cable him before doing so, that it did become necessary, and, therefore, he used the notes. This authority Gregory denies. Jones swears that on returning to London in August he told Gregory just what had been done and that he also agreed to give Gregory $100,000 out of his individual interest in the sale of the mining properties if he would give his hearty co-operation in prosecuting the sale. Gregory denies that Jones told him the details of the contract of July 31, but he admits that he told him that he would give him $100,000 of stock in the May Lundy Company, if (quoting:)

"I would take the same in satisfaction of their having made use of the Swift note, or notes with Pike, in that

connection; but I refused to take it, and refused to ratify the use of the note or notes."

He further says:

"He (Jones) told me that if the May Lundy sale did not succeed that the note was to be given up by Pike. I did not learn what one of the Swift notes had been put up, and I did not know that the original notes had in any way been changed. I was left to suppose that such notes as had been used was one or some of the original Swift notes.'

On August 21, Gregory's brother writes him from Boston as follows:

"In my last or previous letter I wrote you that Butterfield had not given up to me (nor Frank) any note whatever. He said that you told him he could use it in arranging with Pike; and on his return from Maine, he told me that he had put it up as collateral with Pike; but that it could be obtained if you did not approve. He then went to California, and said Jones would go to London and see you the next week."

It thus appears that Gregory knew, by the first week in September at latest, that the Swift note or notes had been put up as collateral with Pike under the agreement of July 31. What course does he now pursue? Does he immediately inform Pike that Butterfield had no authority to pledge the notes? The evidence goes to prove that during the fall months Gregory and Jones were engaged in London in prosecuting to a successful issue the sale of this property, and that it was not until the following December, and after, as Jones swears, an expert had made an unfavorable report of the property so that the sale in London fell through, that Gregory became dissatisfied, and demanded of Pike a return of the notes. Upon this state of facts it would clearly be inequitable to permit Gregory to repudiate the contract made with Pike. He held Butterfield out to the world as the owner of the Swift notes which were pledged to secure the

success of a joint enterprise. He allowed Butterfield to deal with an innocent party as the owner of these notes in furtherance of their joint interests. His conduct shows that he was satisfied to have the Swift notes pledged as collateral if the joint enterprise proved a success, but, if it proved a failure, it was then his purpose to repudiate Butterfield's act and demand a return of the notes. He is estopped by his acts from repudiating the pledge Butterfield made to Pike.

The remaining question is whether Pike has forfeited his right to the notes under the contract of July 31. The contract provides that, in case the Union Trust Company, who were to hold the deeds of the property in trust until January 1, 1884, declined to deliver the bonds of the May Lundy Mining Co. to Butterfield under the agreement, it should be void, and the money returned to Butterfield, and further that the action of the Trust Company was to be ascertained and reported to Pike within thirty days from the date of the agreement. While the evidence is somewhat conflicting, I do not find, taking all that is in the record bearing upon this point, either that the Trust Company declined to deliver the bonds or that any notice was sent to Pike.

Under the contract Butterfield was to pay $25,000 at the time of the agreement, and the remainder of the purchase money, $217,266, on or before January 1, 1884, and "in case the payments are not made as above stated on the first day of January next the sums of money which shall previous to that time have been paid under this agreement . . . . shall be forfeited." Appended to the end of the contract is the provision that for the first payment of $25,000 Butterfield has lodged in Pike's hands the two Swift notes, which notes Pike was to hold until January 1, 1884, unless sooner redeemed by Butterfield on

payment of $25,000, and at that time Pike was authorized to raise $25,000 out of them by pledging them. The fair construction of this provision is that Pike held these notes as collateral security for the first payment under the contract. The contract failed not by reason of any default on the part of Pike, but by the default of Butterfield. The contract provided, in case of Butterfield's failure, he should forfeit all payments before made including, of course, the first. In place of the first cash payment something else was substituted which he was to hold as security for that payment until a certain time, and then if the $25,000 was not paid, he had power to pledge the security to raise the money, that is, he was then authorized to pledge. It does not seem to me a proper construction, or one in accord with the intent of the parties, to hold that Pike was obliged to pledge these notes immediately or within a reasonable time after January 1, 1884, or lose his lien. He was empowered to do so if he chose, but if he deemed it best for the interests of all not to pledge the notes, or found it impossible to raise the money on them, he would not thereby lose his lien upon them. The fair reading of this provision is that Pike was provided a way by means of which he might realize his $25,000 if the notes were not redeemed by January 1, not that he was obliged to pledge them at that time or forfeit all right to them. In my opinion, upon the evidence now before me in this case, Mrs. Pike, as executrix, has a lien on the Swift notes, or their proceeds, to the extent of $25,000, but the decision of this question belongs to equity suit No. 2,170, where all persons claiming an interest in these notes are made parties. The moneys in the possession of the defendants, the Boston Safe Deposit and Trust Company and the Merchants National Bank, referred to in the bill of complaint herein, are held by them subject to the orders of this Court in said equity suit No. 2,170, and no orders relating to

said moneys can properly be made in this suit, which does not include as parties some of the persons who are parties in said equity suit No. 2,170. The bill in this case should be dismissed with costs.

Bill dismissed.

Office Supreme Court U. S.
FILED.
APR 7 1892
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 292.

CHARLES A. GREGORY AND CHARLES F. JONES,

Appellants,

v.

BOSTON SAFE DEPOSIT AND TRUST CO. ET ALS.

BRIEF FOR APPELLANTS.

F. A. BROOKS,

Of Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 292.

CHARLES A. GREGORY & CHARLES F. JONES, *Appellants*,

v.

BOSTON SAFE DEPOSIT AND TRUST CO. ET ALS.

BRIEF FOR APPELLANTS.

The bill of complaint in this case sets forth two distinct and independent claims of title to the funds in the hands of the defendant corporations as agents or depositaries of the court below; one of these claims being made by the plaintiff Gregory in his own right, as the equitable owner of the $20,334.60 Swift note when it was first made or signed, and the other by the plaintiff Jones, the payee of said note, in his own right, as the judgment creditor of Swift in the action at law of Jones *v.* Swift, for the benefit, however, of Gregory, as the assignee of said note under the deed of assignment dated Dec. 4, 1884, and printed at pages 85 and 86 of the record.

As the facts relating to the claim made to the funds in court by Jones as the plaintiff and judgment creditor of Swift in the action at law (wherein the money in dispute was paid

into court) are very few and simple, compared with the facts upon which the claim of Gregory as the beneficial owner of said note at its inception depends, and as a finding by the Court in favor of Jones's legal title to said fund would be equally satisfactory to Gregory with a finding in his favor based upon his own ownership in equity of the Swift note at the time of its date or inception, and as the examination by the Court of Jones's claim of legal title will take much less time and labor than would be required in investigating the equitable title of Gregory to the proceeds of said Swift note, we will present the claim of the appellant Jones in the first place, so that if this claim is sustained, the Court will not need to consider the claim made by Gregory in his own right, or to pass upon that phase of the case at all.

PART I.

Facts as to the Legal Title of Jones.

The note of Swift, the proceeds of which form the subject of this suit, was in these words: —

$20,334.60. NEW BEDFORD, 4 Mo. 20th, 1883.

Three years after date, for value received, I promise to pay to Charles F. Jones twenty thousand three hundred thirty-four dollars 60/100 with interest at six per cent per annum. W. C. N. SWIFT.

Rec., page 22, near bottom.

Upon this note an action at law was brought in the name of Jones against Swift by writ dated April 24, 1886, and returned to the Circuit Court of the United States for the District of Massachusetts, holden on the fifteenth day of May, 1886. At the time of bringing that action the note was

in the hands of one Frederic A. Pike, of Calais, Maine, between whom and said Gregory an amicable suit in equity had been brought and was then pending in said Circuit Court, to determine which of the two was entitled to the ownership or benefit of said note. In view of the expected decease of said Pike and of the consequent failure of said equity suit to serve its intended purpose, the note was, by the mutual consent of said Pike and Gregory, on the thirtieth day of November, 1886, delivered over to Judge Hoar, with authority to the said Hoar to determine as a referee to which of the two claimants the said note belonged, and to carry his determination into effect by passing to such party the note itself.

Pike died on the second day of December, 1886, while the note remained in the hands of said referee, and before any decision or award had been made by him as to the rightful ownership of the said note. On the sixteenth day of December, 1886, judgment for the plaintiff Jones was entered in his action at law against the said Swift upon said note for the sum of $24,839.95.

On the sixth day of January, 1887, Swift paid into court the amount of said judgment voluntarily, having obtained a stay of execution on the preceding twenty-eighth day of December, to enable him to do so, or to prevent the issue of process upon said judgment against him.

Rec., page 29.

Swift paid this money to the clerk of the court and took his receipt therefor, dated Jan. 6, 1887, in the words following: —

"Received of William C. N. Swift, by his attorney, Henry W. Swift, twenty-four thousand nine hundred and twenty-six and 90/100 dollars, to remain in court subject

to the order of Court of Dec. 28, 1886, in No. 2632 law docket, Charles F. Jones *v.* William C. N. Swift, said $24,926.90 being the amount of the judgment and interest in said cause to date.

(Signed) JOHN G. STETSON, *Clerk.*"

Of this money so paid into court $24,000 was afterwards deposited with the Boston Safe Deposit and Trust Company, defendant, for safe keeping, and the residue with the Merchants National Bank, defendant, for the same purpose, as alleged in the bill of complaint.

Rec., page 4, below middle

The Boston Safe Deposit and Trust Company admits its possession as the agent or depositary of the court of said sum of $24,000, and submits to the Court the question of its liability for the same, as defendant in this case.

Rec., page 6, *Ans.* of B. S. D. &. T. Co.

The other defendant, the Merchants National Bank, in its answer, denied being in possession of the residue of said fund, and in view of such denial and of the small proportion of the fund alleged to be in possession of said bank, the plaintiffs, to save the time of this Court, are content to waive that part of their appeal and to permit the dismissal of said bill of complaint as against the said Merchants National Bank, defendant, to stand, thus limiting the inquiry of this Court to the $24,000 fund in the hands of the Boston Safe Deposit and Trust Company, the other defendant.

The two corporations alleged to be in possession of the money paid into court, Jan. 6, 1887, by Swift as the judgment debtor of Jones, were and now are the only real or necessary defendants to this cause.

The other defendant, Mary H. Pike, joined as a nominal defendant against whom no relief was prayed or sought or could be had, was so joined in pursuance of the provisions of Section 728 of the Revised Statutes of the United States as amended, she being a non-resident of Massachusetts District, and claiming a lien on said fund in court, in order that the Court might not refuse to proceed to a hearing and adjudication of the claim of the plaintiffs in her absence, and to enable her to appear and present her own claim to said fund if she desired, and that she might in any event be bound by whatever adjudication the Court below should see fit to make.

Rev. Stats. U. S. §728.

The Court below paid no heed to the claim made by the plaintiff Jones to the fund in court, but treated this case as a controversy between the plaintiff Gregory and the defendant, Mrs. Pike, and them alone, and held that Mrs. Pike's claim could not be adjudicated in this cause, and ruled that the moneys in the possession of the defendant corporations were held by them "*subject to the orders of this Court in said equity suit No.* 2,170, *and that no orders relating to said moneys can properly be made in this suit, which does not include as parties some of the persons who are parties in said equity suit* 2,170," and thereupon dismissed the plaintiff's bill absolutely and unqualifiedly with costs.

The dismissal of the plaintiff's bill for this alleged reason is the first error assigned by the plaintiffs in this cause.

Law as to the Claim of the Plaintiff Jones.

I.

If it were true, as stated by the Court below in the closing sentence of its opinion (Rec., page 241, bottom), that said Court was not at liberty, in determining this cause, to pass any order relating to the disposal of the money paid into its hands by Swift in the action at law of Jones *v.* Swift (No. 2,632) because said moneys were held by the defendant corporations subject to such orders of the Court as might be made by it in determining the old equity cause of Gregory *v.* Pike (No. 2,170), then it was not within the legitimate power of the Court to decree the final and absolute dismissal of the plaintiffs' bill of complaint brought by one person (Gregory) who was the sole plaintiff in that old equity suit, and by another person (Jones) who was not a party to that equity suit, so that Jones's title could not be adjudicated upon in said equity suit at all.

This decree of absolute dismissal, if allowed to stand as against Gregory, has cut off forever his claim to the fund in court; and if allowed to stand as against Jones, it has done the same thing as to him, although Jones's claim could not be considered by the Court in passing upon equity suit No. 2,170, and yet has been cut off or barred by the decree of dismissal entered in this cause.

The Court below, therefore, while proposing to reserve its decision of this case, or to turn over the parties therein to some other cause for adjudication of their claim, has in fact adjudicated adversely to both of them in this cause, and left nothing for them or either of them to litigate in any

other cause. This may have been an oversight on the part of the Court below, and probably was so, but the effect is nevertheless fatal to the plaintiffs, even if not so intended.

II.

The only evidence in this case to justify the Court below in the statement found at page 241 (bottom), of its opinion, that the moneys claimed are subject to disposal only in the old equity cause 2,170, is found in an order of the Court below passed in the action at law of Jones *v.* Swift, No. 2,632, Jan. 10, 1887, by which the Court below undertook to transfer the moneys paid into court in that action at law Jan. 6, 1887, to the equity cause of Gregory *v.* Pike (No. 2,170), to remain subject to the order of the Court in that old equity cause.

Rec., page 28, top.

This order was, as we submit, extra judicial, and therefore invalid and void. The money paid into court by Swift as the defendant and judgment debtor in the action at law of Jones *v.* Swift had been paid by him voluntarily after judgment and before execution, and not under or by force of the legal process of the court, and consequently the court gained thereby no power or control whatever over said fund, except as trustee or depositary thereof for the benefit of the real or beneficial plaintiff in the said action at law No. 2,632.

In passing the order of Jan. 10, 1887, above mentioned, the Court below assumed an unwarrantable authority over the fund so paid into and received by the Court as constructive trustee for the benefit of the plaintiff Jones or persons represented by him, and the Court below in transferring the

fund to another cause and changing the trust which had been imposed or devolved upon it by construction of law, if permitted so to do, would deprive the plaintiff Jones or the persons represented by him of their property in said fund, without due process of law, in violation of the terms of the Fourteenth Amendment of United States Constitution.

III.

If we are correct in the foregoing positions, then the decree of dismissal of the bill must not only be reversed as to the plaintiff Jones, but he should have a decree in his favor for so much of the fund in court as is now in the hands of the Boston Safe Deposit and Trust Company, defendant, subject, however, to all proper charges or expenses of said company and to the payment of its costs of suit.

PART II.

Facts relating to the Claim of the Plaintiff Gregory to the Proceeds of the $20,334.60 Swift Note.

The facts pertaining to the respective claims of Gregory and of Pike to the ownership of the $20,334.60 Swift note at and before the time of Pike's death, Dec. 2, 1886, were as follows: —

The plaintiff Gregory was in April, 1883, the owner of eighty thousand shares of the stock of the Great Sierra Silver Mining Company, and placed this stock in the hands of one George W. Butterfield for sale. Butterfield negotiated a sale of the same to Swift, of New Bedford, Mass., who paid therefor partly in cash and partly by giving his two notes of $20,334.60 each, drawn payable to Butterfield, one in two years, and one in three years from April 4,

1883. Butterfield passed these notes over to Gregory, April 9, 1883, and Gregory, on the same day returned them to Butterfield, taking Butterfield's receipt therefor, or declaration of trust, showing that he held them as the property of Gregory, and was to hold them in trust for the said Gregory.

Gregory's Dep., Rec., page 58.

As both Gregory and Butterfield were then about to sail together from New York for London, these two notes were left behind and placed in the hands of the plaintiff Jones. Jones on the twentieth day of the same April surrendered the note payable in three years to the maker, Swift, and received in its place another note of said Swift for the same amount, dated April 20, 1883, on three years' time, drawn payable to Jones, and not negotiable, which note forms the subject of this present suit.

At and before the sale to Swift of Gregory's mining stock by Butterfield, he, Butterfield, had a contract with one Frederic A. Pike, of Calais, Me., for the purchase from him of certain mines in California, owned or held by said Pike. This contract was dated January, 1883, and ran until the thirtieth day of July, 1883. It expired on that day (July 30, 1883), by reason of the failure of Butterfield to make the required payment.

Pike's Deposition, 5th and 6th Answers, Rec., p. 110.

On the following day (July 31, 1883) Butterfield entered into a new and different contract with Pike for the purchase of the same property, and other property held by Fox & Kellogg, as set forth in full at pages 83, 84, 85 of the Record, and this three years' Swift note, then remaining in Jones's possession was, as Pike states, delivered or passed over to

him, either by Jones or Butterfield, or both of them, by way of pledge, or as a means of inducing said Pike to enter into the new contract of July 31, 1883 with Butterfield for the sale to him of the mining property a second time.

Pike's Deposition, Rec., pages 113, 114.
Gregory's Deposition, Rec., pages 58, 59.
Contract, Exhibit A, Rec., pages 83–85.

That use of Gregory's note by Jones and Butterfield did not come to Gregory's knowledge for some months, and as soon as it did come to his knowledge he notified Pike of his ownership and caused demand to be made upon Pike for the same.

Gregory's Dep., Rec., pages 58 (bottom) and 59.

Pike refused to give up the note to Gregory when demanded of him in December, 1883.

F. W. Gregory's Dep., Rec., page 189, bottom.

Butterfield's second contract for buying Pike's mines matured or became payable Jan. 1, 1884, not many days after the demand made by Gregory on Pike for the note here in question, . . . and Butterfield made default Jan. 1, 1884 with Pike, just as he had done on the 30th of July, 1883, in the case of his first or previous contract of purchase.

Pike, however, in his second contract with Butterfield, took the precaution to provide that

"*in case the payments are not made as above stated, on the first day of January next, the sums of money which shall previous to that time have been paid by the said Butterfield to the said Pike, under this agreement, shall be forfeited, the deeds lodged in escrow . . . the day after shall be delivered to the said Pike, and this agreement to all intents and purposes shall be at an end.*"

Contract, Rec., pages 83, bottom, 84, top.

This contract was rescinded by Pike in January, 1884, pursuant to his right reserved as above to do so.

See Rec., page 95, Exhibit 5, Stipulation.

During the year 1884, by an amicable arrangement between Gregory and Pike, a suit was brought in the State Court of Massachusetts to obtain a judicial determination of their respective claims to the Swift notes, which till then had remained in the possession of Pike . . . though the courts of Massachusetts possessed no jurisdiction as between them, both being non-residents, and the court below would not have had jurisdiction of the cause but for its subsequent removal to that court, where it was duly entered, and continued to be pending until the decease of Pike, in December, 1886.

In January, 1886, or a short time before the $20,334.60 Swift note in dispute between Gregory and Pike, was to mature, it was arranged and agreed between them that the said Swift note (with another) should be passed over by Pike to a third person, to abide the result of the then pending equity suit, and also that an action at law should be brought to recover the contents of the note here in question from the maker Swift as soon as it should mature, this action to be under the joint control and direction of the same counsel of the respective parties as were employed by them in the equity suit then being prosecuted in this court for determining the rightful ownership as between them of the said notes.

Gregory's Dep., Rec., page 61.
Exhibit E, Rec., page 89.

The claim of Pike to said note was based upon the pledge thereof to him by Butterfield and Jones, July 31, 1883, or

upon an alleged forfeiture of said note to said Pike by reason of Butterfield's default Jan. 1, 1884, in making payment under the contract of July 31, 1883.

The claim of Gregory as the equitable owner of said note rests not only upon the fact that he originally furnished to Swift the consideration of the note, but upon the further fact that Gregory had brought his suit against Jones in the State Court of Massachusetts, charging him, Jones, with a conversion of said note to his own use by delivering the same to Pike July 31, 1883, and prevailed in said suit, and recovered a judgment against Jones for such conversion, and upon the further fact that, in December, 1884, and prior to the commencement of Gregory's suit against Pike, said Jones had executed an assignment of said note to said Gregory, thus conveying to said Gregory whatever right he (Jones) ever had in or to said note, and had authorized Gregory to use his (Jones's) name to collect said note for his (Gregory's) benefit.

Rec., page 85, Exhibit B.
Rec., pages 96–100, Exhibit 6.

In November, 1886, Pike became dangerously ill, his life was despaired of, and it became manifest to the counsel employed in the equity suit of Gregory *v.* Pike that in the event of Pike's death the suit would fail of its purpose of determining as between their clients the ownership of the Swift notes.

Thereupon, as such counsel, they entered into an agreement in writing for the submission of said equity suit to the arbitration of the Hon. E. R. Hoar, and the Swift note here in question (and another like note of $15,000) was passed over to said Hoar to be finally delivered by him to which-

ever of the two claimants he should find to be entitled thereto. Very soon after this had been done Pike died; and by reason of Pikes's death, if not by reason of the previous submission of the equity suit to arbitration, it is supposed by us that the said equity suit of Gregory *v.* Pike became abated, or closed, and concluded for all purposes, unless and until it should be revived by or against Pike's legal representatives, . . . as in fact it never was.

This view was adopted by Pike's legal representatives, and the hearing under the submission, begun before Pike's death, was continued after his death, till it resulted in an award of the referee in favor of Gregory as the owner of both the Swift notes.

Exhibit F, Rec., page 89.

At the argument of this cause in the court below the claim of Gregory to the fund in court as against Pike or his legal representatives was placed mainly upon the ground that the equity suit of Gregory *v.* Pike (No. 2,170), originally intended as a test suit for determining their respective claims to the Swift notes, had failed of its purpose, and been abandoned by mutual consent before Pike's death, and that when the notes of Swift were delivered over to Judge Hoar, as referee, with power to him to award as to the ownership thereof as between Pike and Gregory, the old suit was withdrawn, and thereby closed or settled, or, if not so, that when Pike died, and the hearing was proceeded with before the referee by his (Pike's) legal representatives, and resulted in an award in favor of Gregory, then all claim to these notes by or in behalf of Pike's estate was cut off.

Upon the state of facts above recited, Gregory, in the court below, took the ground that the old equity suit had been

either withdrawn by the parties or practically abandoned, and that a referee had been substituted to act upon said matter and in place of the Court; and also took the further ground that if the equity suit had not been so withdrawn or referred to arbitration during Pike's lifetime, yet it had become abated by the decease of Pike (Dec. 2, 1886), and was no longer under the control or jurisdiction of the Court, and requested the Court below so to hold or find. This the Court declined to do, and did rule to the direct contrary on both these points. The rulings made were in the words following, found at page 236 of the record, at the seventh line from the top: —

"The submission purports to be a submission of the equity cause then pending in the United States Circuit, and that cause is referred to and of necessity made a part of the submission. In that cause there were other parties besides Gregory and Pike, and a submission, whether by rule of court or otherwise, without the assent of these other parties whose interests might be affected, was irregular and void. If a submission be entered into in a pending cause, or if a reference is undertaken to be made by agreement of parties, all persons who are parties of record to the suit must unite equally, whether they are merely nominal parties or really interested."

This language was used by the Court below for the purpose of invalidating the award of the referee as affecting the title to the notes, and not merely for the purpose of invalidating the submission alone, the argument being that the award could not be valid if the submission was invalid and void. The Court gave as a reason for this ruling that there were other parties to said equity cause No. 2,170 besides Gregory and Pike, and that those other parties were not made parties to the submission, and therefore held the sub-

mission invalid. It is true that Swift, the maker of the note in the suit brought by Gregory for determining the title to the two notes there in question, was joined as a party defendant, and it is also true that Swift did not join in executing the submission.

Both Gregory and Pike understood that Swift was merely a nominal defendant, and not a real or necessary party to said old equity suit, inasmuch as his notes had not become due and payable (December, 1884) when that old equity suit was brought, and therefore he had no interest therein. But, notwithstanding the fact that no claim was made by Gregory against Swift in said suit, or could have been made, and that Swift was joined only as a nominal party, he appeared in court, and resisted Gregory's claim against Pike to the utmost, so that both Gregory and Pike desired to drop him from the suit. For this purpose Gregory applied to the Court for leave to dismiss his bill as against Swift, offering to pay his costs; this motion was resisted by Swift.

Motion to dismiss. etc., Rec., page 95, Exhibit 4.

This motion was overruled and denied by the Court. Gregory and Pike had done all they could to get rid of Swift as a nominal party, and had been prevented by the Court from doing so.

Suppose, however, it were true that Swift was not merely a nominal party defendant in the old equity cause 2,170, but a real party defendant therein, and for that reason was not bound by the submission of that cause to Judge Hoar as referee: that fact would have no bearing or relevancy upon the question now before the Court in this cause, whether the money paid into court by Swift in the action at law of Jones

v. him (2,632) belongs to the plaintiff Gregory or to the defendant in this cause, Mrs. Pike. It is obvious that Swift himself neither can nor does now make any claim to it, and so is not a necessary party to the litigation at the present time.

Again, the Court below, after having determined that neither the submission to arbitration nor the award of the referee in favor of Gregory were valid or binding, and that Gregory had gained thereby no right or title to the note in question as against Pike, then proceeded to consider the question whether Pike, by withdrawing from escrow his deeds of the property bargained to Butterfield, and failing to pursue or carry out on his part the contract with Butterfield, had waived or lost his right or lien as pledgee of the notes, and on this point found and held that he had not waived or lost such lien, but might both reclaim the deeds and hold on to the property bargained to Butterfield, and subsequently contract with others for its sale to them (as he in fact did), and at the same time treat the Swift notes as forfeited to him by Butterfield.

Rec., page 95, Exhibit 5, Stipulation.
Gregory's Dep., Rec., page 68, top.
Butterfield's Dep., page 34, Ints. 16–22.

The Court in this way reached the conclusion that, as between Gregory and Pike, the latter (or his legal representatives) was entitled to a lien to the extent of $25,000 on the two Swift notes, amounting, without interest, to $35,334.60, but refused to enter any decree in the case at bar giving effect to such lien, for the reason, as assigned, that no decision whatever of the claim in suit could be rendered

except in the old equity cause No. 2,170, . . . and the Court accordingly dismissed the bill, not only as against the plaintiff Gregory but also against the other plaintiff, Jones.

Hence it seems manifest that the old equity cause (2,170) could not possibly serve Gregory as a means or medium for asserting his claim to the proceeds of the note of Swift, paid into court Jan. 6, 1887, in the action at law of Jones *v.* Swift, and that Gregory's claim to that fund was wholly cut off by the decree dismissing the bill in this case, if this decree is allowed to stand.

[It may, however, be claimed on the part of the defendant Mrs. Pike that George W. Butterfield, by whom said Swift note was pledged to Frederic A. Pike, also claimed the ownership of said note, and was a party to said old equity cause as such claimant, and that he (Butterfield) was meant or referred to by the Court below in its opinion (Rec., page 242) as one of the parties to said old equity cause in whose absence no decision could be made as to the disposal of the fund claimed by the plaintiffs in this bill of complaint. If any such position as this be taken by the counsel for Mrs. Pike, we reply, *firstly*, that there is no evidence of record in this case to support that position; *secondly*, that Mrs. Pike herself is joined as a defendant in this suit as a nominal party only under the statute (§ 728, Rev. Stat.), in order to give the Court jurisdiction over the fund in dispute, and can do no more at best than to present her own claim to the fund; *thirdly*, that a reference to the deposition of Butterfield himself, taken in this cause, will show the fact that he (Butterfied) has no lawful claim on the $20,344.60 note, and that any pretence of that sort is groundless. In Butterfield's answer to Int. 7 (Rec., page 31), he testifies that both the Swift notes, viz., that of $20,334.60 and that of $15,000, pledged by him to Swift, "*were the property of Charles A. Gregory*"; *fourthly*, that even if it were true and appeared in evidence in this case that the fund in the hands of the defendant corporation was claimed by Butterfield, yet the Court below could not act upon or pay any regard to such claim until Butterfield should appear before it and take formal action of some kind for the purpose of asserting such claim. Nothing of this kind has been done by Butterfield as yet.]

Law as to the Claim of the Plaintiff Gergory to the Fund.

I.

The dismissal of the bill of the plaintiff Gregory for the reason assigned by the Court at the end of its opinion (Rec., page 241, bottom) was predicated upon two assumptions: one to the effect that the fund in question and at its disposal had been duly transferred from action at law No. 2,632 to old equity suit 2,170 by virtue of the order of Court of Jan. 10, 1887. (We have already considered this position in that portion of this brief relating to plaintiff Jones, and endeavored to show it erroneous.)

The other assumption was to the effect that the old equity suit of Gregory *v.* Pike was then (October, 1888) still pending as a cause in the court below as between Gregory and Pike or his legal representatives, and that as between them at least it involved the same right of Gregory asserted in this case to the proceeds of the note at bar, and that the case at bar did not involve any question or embrace any parties or rights which could not be adjudicated in the old equity suit 2,170 as well as in the present case, and that Gregory might and should be compelled to litigate in No. 2,170, instead of in this cause, for the fund paid into court in the action at law of Jones *v.* Swift.

We submit that the Court below in making and acting upon the foregoing assumptions was entirely mistaken, and that by the dismissal of his present bill of complaint, if allowed to stand, Gregory has been left wholly remediless as a claimant of the fund paid into court in the action at

law of Jones *v.* Swift, No. 2,632, not only in this cause but in any and every other cause.

This is so, as we understand, for several reasons: —

Firstly, because the old equity suit of Gregory *v.* Pike (No. 2,170) became abated by the death of Pike, Dec. 2, 1886, and finally ended or closed, after the note in question, the subject of claim in that suit, had passed out of Pike's hands into the hands of the referee (Judge Hoar), the said suit being incapable of revival against the representatives of Pike, because they were not resident within or subject to the jurisdiction of the Court below, even if they had remained in possession of the note after his death, as they did not: —

Secondly, because the suit in equity No. 2,170 was a proceeding against Pike and him alone, *in personam*, based upon his alleged unlawful possession of the note in question; while the case at bar is in the nature of a proceeding *in rem.* for the purpose of holding the fund in possession of the defendant corporations as agents or depositaries of the court, and is the only possible method of asserting claims to the said fund, known to the plaintiffs or either of them. Certainly no such claim could be asserted by Gregory were he to adopt the course suggested by the Court below, and try to prosecute his old equity cause against Pike's representatives, were it possible for him to do so after the death of Pike, as we submit it was not.

II.

The chief ruling of the Court below bearing upon Gregory's claim, and which is assigned as erroneous, is that the Court (having assumed the Swift notes to have been duly and lawfully pledged to Pike by Butterfield and Jones on the thirty-first day of July, 1883) found or held that said Pike con-

tinued to have all the rights of a pledgee thereof, after the debt or demand for the security of which the pledge was made had ceased to exist.

Our contention on this point is, that the contract of July 31, 1883, by which Pike agreed to execute deeds of conveyance of the mining property, and to place them in escrow in the hands of the Union Trust Company of New York, there to remain until Pike should have received the purchase money thereof in full from Butterfield, was executory merely on Pike's part, and was never carried into complete execution by him, so as to enable him to hold Butterfield liable for the price or purchase money, but that said Pike, soon after the first day of January, 1884, elected to treat said contract as forfeited by Butterfield on account of his default of payment, and took back the deeds previously deposited in escrow by him, and by so doing released and discharged the said Butterfield from all liability for said purchase money, or any part thereof.

Contract, Rec., page 49, middle.
Butterfield's Dep., Ans. 15–26, Rec., pages 33–35.
Gregory's Dep., Ans. 18, Rec., page 68, top.
Exhibit E, Rec., page 52.

That contract also provided that the mining property of Pike, the deeds of which were placed in escrow for the benefit of Butterfield, was to remain in the possession and control of said Pike until Butterfield should have performed his part of the contract by the payment of the price in full, as was never done or required to be done by Pike.

Contract, Rec., page 49, middle, 19th line from top.

Under these circumstances, it is submitted that the defendant Pike, after having reclaimed the title deeds from the Trust Company, and while retaining the property, and offering to sell it to others, as he did, could not also hold Butterfield liable to him for the price or purchase money, or for any portion thereof, and therefore, could not thereafter hold the two notes as security for a payment or demand which had ceased to be enforceable against Butterfield personally.

If we are correct in the statement that the said Pike elected to treat the contract of July 31, 1883, as at an end (as it was provided he might do in case the purchase money was not paid Jan. 1, 1884, see Rec., page 49, middle), and did so treat it as at an end, it seems to follow that the consideration on which the pledge of these notes by Butterfield to Pike rested, viz., the agreement of Pike to convey, also came to an end, so that Pike could no longer hold the notes so pledged, even as against Butterfield himself, or the payee, Jones, because of the want of a valuable consideration, or an entire failure of the consideration on which the pledge as originally made was based.

Giles *v.* Edwards, 7 T. R. 181.
Wanzer *v.* Cary, 76 N. Y. 528.

[At the hearing of this same question before Judge Hoar as referee under the submission, the counsel for Mrs. Pike, in trying to meet Gregory's aforesaid contention, took the ground that Pike was at liberty to retain the ownership of the mining property after the default of payment by Butterfield, Jan. 1, 1884, and also to retain and hold the two Swift notes as forfeited to him under the terms of the pledge to him of July 31, 1883. This position was not sustained or sanctioned by the referee.]

III.

The Court below stated as a fact that there were other parties interested in the $20,334.60 Swift note besides those who were either before the Court or represented in any way in the present case, and gave that as a reason why it could not adjudicate finally in favor of Mrs. Pike in this case, as it would otherwise have done.

Opinion of Court, Rec., pages 241, bottom, and 242.

This statement was, as we submit, wholly unsupported by any evidence in the case; but even if it had been correct and in evidence, the Court was not at liberty to enter a final decree dismissing the plaintiffs' bill, and thereby to cut off forever the plaintiffs' claim to the fund, and yet leave the defendant Pike free to prosecute and maintain (perhaps) her claim to said fund after all danger whatever to her from the adverse claim of the plaintiffs had been removed by the Court itself.

It may, however, be said that the Court below intended no such result as this from the dismissal of the plaintiffs' bill; and this may be true. The Court below probably supposed that the rights of the plaintiff Gregory as a claimant of this fund had been saved by the order passed in the action at law (printed at page 28 of the Record) purporting to transfer the fund in question to another cause, in which other cause Gregory was plaintiff and Pike, deceased, was defendant.

Rec., page 28, top.

This order could have no such operation as we submit, for several reasons: —

1. The Court had no power or jurisdiction to enable it to transfer a fund paid by a defendant into court to satisfy a judgment recovered against him in an action at law, and applied by him in satisfaction of such judgment, to any other use or purpose but the satisfaction of that judgment.

2. Prior to Jan. 10, 1887, the date of the order purporting to transfer this fund from the action at law (No. 2,632) to the old equity cause of Gregory and Pike (No. 2,170), that old equity cause had been twice taken out of court, *firstly*, by the delivery of the notes in controversy in that cause to Judge Hoar, as referee, with power to determine all the questions raised in that suit, and to execute his determination by passing over the notes themselves to the successful party; and, *secondly*, by Pike's death, on Dec. 2, 1886, thereby abating the suit against him, if it had not been already taken out of court, by the submission to arbitration, as we contend it had.

Draghicevitch *v.* Draghicevitch, 78 Cal. 378.
Story's Eq. Plead., § 369.
Milford's Eq. Pl., pages 57 and 58.
Dan. Chan. Prac. (5th Am. ed.), 1,514.

It was known and understood at the time the Court passed the order of Jan. 10, 1887, that the old suit of Gregory *v.* Pike had become abated by the death of Pike. It was, perhaps, supposed that said cause might and would be revived. If so, it was a mistake. The plaintiff Gregory could not revive that old suit as against defendants residing in Maine, if such a thing were desired; and, after the withdrawal of the cause from court, by the submission to arbitra-

tion during Pike's lifetime, no cause of action against Pike's estate, and in favor of Gregory, remained or existed at all; so that there was no possibility of a revival of the suit, even if Pike's legal representatives had been within the jurisdiction of the court below and the reach of its process.

SUMMARY.

Firstly, the decision of the Court below is impeached by Jones, because that Court overlooked, or entirely disregarded his legal title to the fund, or else turned him over for the assertion of his right to another cause (old 2,170) where he was not a party and could have no relief whatever.

Secondly, the plaintiff Gregory complains of that decision, not because the Court held that the pledge of the Swift notes to Pike was originally (July 31, 1883) valid and binding as collateral security for the payment of a part of the price of Pike's mining property (*i. e.* for $25,000 of said price, payable Jan. 1, 1884), but because it held that said notes were not released and discharged from said pledge by Pike's own act, in withdrawing from escrow his deeds of title, and thus releasing and relieving Butterfield from his contract of purchase, and all liability for the entire purchase money or price thereof. The effect of this release by Pike of said Swift notes was to leave them in the hands, either of Jones the payee and legal owner, or of Gregory as the equitable or beneficial owner, freed from said pledge.

The contention of the plaintiff Gregory is that his claim as the original equitable or beneficial owner of said $20,334.60 note before the pledge, or the claim of Jones as payee and

legal owner of said notes at the time of the judgment thereon (entered Dec. 16, 1886) in his action at law against Swift, should and must prevail, and entitle the plaintiffs in this suit, or one of them (no matter which) to a decree for the fund in the possession of the Boston Safe Deposit and Trust Company, defendant ($24,000), unless this Court is satisfied that the Court below was correct in finding (as it did) that the defendant Mrs. Pike had established a prior lien for $25,000 upon said note in her own favor (Rec., page 241); and upon this point the plaintiffs respectfully submit that the Court below was in error, for several reasons: —

Firstly, because Mrs. Pike had no standing before the Court as a claimant of the fund paid into court, and has not attempted to assert any such claim in this cause, but was made a defendant merely to enable her to resist the claim of the plaintiff Gregory, and to defeat his claim, but not to assert any claim of her own;

Secondly, because before Mrs. Pike can be permitted to claim said fund, either in this cause or in any other cause, as the representative of the estate of her deceased husband, she must take out letters testamentary or of administration upon her husband's estate in this district of Massachusetts, where the fund in question now is, and must then bring some proper proceeding to assert or enforce her said claim, and until this has been done, her claim cannot be entertained or considered at all by this Court or by the Court below, so that it was the duty of the Court below to pass upon the claims of the present plaintiffs in this case without any regard whatever to any claim of Mrs. Pike, or any interest which might have been asserted by her, if she had been lawfully before the Court as a claimant of said fund

by or under some due legal process or proceeding against the defendant corporations or the funds in their possession, as in fact she was not.

It is, we suppose, perfectly obvious, that in a cause brought by the plaintiffs Gregory and Jones, neither of whom reside in Massachusetts, against Mrs. Pike, who does not reside in Massachusetts, the Court below would have no jurisdiction whatever, and that the most Mrs. Pike could do as a party defendant to this cause was to show (if she could) the want of title to the fund on the part of the plaintiffs; that is, she could at most only negative the plaintiffs' claim, and could not be permitted to assert or enforce any claim of her own to said fund, as she was allowed to do by the ruling of the Court below, without some new or independent proceeding brought by her for that purpose in her own right. And we have already endeavored to show that she could only do this after taking out administration on her husband's estate in the Massachusetts district.

As a result of the above, it seems to us to follow, that whatever interest Swift may have originally had as a defendant in the old equity suit, or as the maker of the note in question, it ceased upon and after the payment by him of said note into court in the action at law of Jones *v.* Swift; that thereupon the only remaining interest in said note or its proceeds was either in Jones as payee and legal owner, or in Gregory as beneficial owner; and that the present suit combines those two titles, and does not and could not embrace the interest or claim of the legal representatives of Pike deceased, (citizens of another district), by whom no demand or claim to said note or its proceeds was presented

in legal form before the Court below, or could be now presented, unless and until they should have taken out letters testamentary or of administration in the Massachusetts district upon the estate of said Pike. Therefore the question of the right or claim of said Pike or his heirs to said note was not really before the Court below for its adjudication in this cause, and was not a proper subject for any action whatever by said Court, though it was by said Court treated or made a sufficient cause, reason or ground for the unqualified dismissal of the plaintiffs' bill, and such dismissal was erroneously decreed.

F. A. BROOKS,

Solicitor and of Counsel for Plaintiffs.

Supreme Court of the United States.

OCTOBER TERM, 1891.

NO. 292.

IN EQUITY.

CHARLES A. GREGORY ET AL., *Appellants*,

v.

BOSTON SAFE DEPOSIT AND TRUST COMPANY ET AL., *Appellees*.

BRIEF FOR ONE OF THE DEFENDANTS, MARY H. PIKE, — ON THE FACTS.

THE PLAINTIFF'S CLAIM.

THE subject-matter of this suit is the proceeds, now in the registry of the court, of a certain promissory note made and signed by W. C. N. Swift, dated April 20, 1883, for $20,334.60, payable in three years with interest, to Charles F. Jones, — not negotiable.

Under a contract between the original defendant, Frederic A. Pike and one George W. Butterfield, in which said Charles F. Jones was equally interested with Butterfield, this note (as well as another) came into the possession of said Pike on July 31, 1883. The complainant, Gregory, now claims that in equity it belonged to him, and brings this bill to obtain the proceeds. He rests his claim on two supports, as follows: —

(1) That the contract under which Pike received this note "became inoperative and void by reason of the decli-

nation of the Union Trust Company of New York to deliver to said Butterfield the bonds of the May Lundy Mining Company of London, as provided in said contract; and that the said Pike thereupon ceased to have any right to retain the said Swift note as against the said Butterfield or your orator." (Record, p. 2.)

(2) That by virtue of the submission by this complainant and said Frederic A. Pike, "of the question of the ownership of said two notes to the determination of Hon. E. R. Hoar, as arbitrator," and of certain action under that submission, the proceeds of the note claimed in this suit had become "moneys in trust for the use and benefit of said Gregory as the owner of said note." (R. pp. 4 and 5.)

STATEMENT OF FACTS.

In 1880 Butterfield sold certain mining property, nominally to the original defendant in equity suit, No. 2,170, Frederic A. Pike, really to Pike and certain associates. Early in 1883 Butterfield became desirous of getting this same property back into his own hands, that he might sell the same in England, as he believed, at a large profit. He had then associated with himself Charles F. Jones, who made the cash payment called for by the first contract with Pike, that of January 29, 1883. That contract was to hold good till July 30 in that same year. Till that time Butterfield had the right to acquire full title by making full payment ($171,438).

Butterfield did not leave for England immediately after January 29, 1883. He stayed in this country, apparently to raise further means for carrying through this enterprise. Before March had passed, he and Jones had got into negotiation with Gregory and Kemp, — with Gregory and Kemp, as persons who could furnish the requisite means. These means at that time consisted of shares of stock in the Great Sierra Consolidated Mining Company, 160,000 shares between them; Gregory's number being slightly the larger.

These shares were by Gregory and Kemp transferred to Butterfield. He was made legal owner of the whole

number. Holding the legal title to those shares, Butterfield, on April 4, sold them to Swift, who has since held them, under title from Butterfield, without shadow of claim upon them from Gregory or Kemp.

The notes which Butterfield took for these shares were four notes, each for $20,334.66, payable to G. W. Butterfield or order, — negotiable notes. Thus Butterfield was the legal owner of these notes.

All this with Gregory's knowledge and consent. Still further, with his subsequent ratification and strong confirmation. For, on April 9, 1883, two of these notes (more than all that Gregory now claims), having been by Butterfield indorsed and delivered to Gregory, were on the same day by Gregory passed back again into the hands of Butterfield. They were so passed indorsed in blank by Butterfield, to be delivered, with Gregory's knowledge and consent, into the hands of Jones for negotiation.

Thereupon, Gregory, with Butterfield, left this country for England; and left these negotiable notes here in the hands of Jones. (106, *Ans.* 34.)

On April 20, Jones surrendered to Swift the four notes, those taken for Kemp's stock, as well as those taken for Gregory's; and took in exchange for the four, five other notes, one of which five is the note now in controversy. This note, with two other of the new notes received from Swift on April 20, was made payable to Jones — Charles F. Jones — and was not negotiable. It was made payable in three years from date, that is, on April 20, 1886. The other two, of the five new notes of April 20, were payable to Jones and negotiable; and on short time, for four and six months respectively: one for $10,000 and the other for $15,000. These last two notes Jones soon procured discounted, and used their proceeds for the benefit of all the partners. (138, *Ans.* 74; 115, *Ans.* 120; 154, *Ans.* 21.)

This change of notes, however, was unknown to Gregory. And so far as Gregory's knowledge and thought and action were concerned, these notes redelivered by Gregory to Butterfield, on April 9, 1883, as negotiable notes, remained negotiable notes till December, 1883. Till then, as Gregory

testifies, he "did not know that the original notes had in any way been changed." He was first informed of it by Kemp, "in December, 1883." He says: "I never knew of the making of the exchange notes which bore date April 20, 1883, until some time in December, 1883." (75, *Cross-Int.* 75.) Here, then, was this plaintiff, Gregory, putting negotiable notes into the hands of Butterfield and Jones in April, 1883, and allowing them to remain there till the following December.

At the time the notes were changed or immediately afterwards, Butterfield, Gregory, and Kemp were in London, prosecuting the purpose for which they went there — engaged in the attempt to sell this property of Pike's. (163, *Ans.* 86; 164, *Ans.* 87; 128, *Ans.* 10.) They were, under the then contract, bound to sell it before July 30: to sell it so as to pay for it on that day at latest. And as the month of July came and began to wear away, it began to be quite certain that this could not be done. Kemp came away from London early in July. Butterfield about the same time came over to arrange with Pike for an extension of his (Butterfield's) right to purchase Pike's property.

Butterfield met Jones and Kemp in Boston. Jones had with him the remaining three of the five notes taken from Swift, on April 20; and with Butterfield's assent, one of the larger for $20,334.66 was given up to Kemp. The other two, one for the last-mentioned sum and a smaller one for $15,000, were taken by Butterfield and Jones to Calais, Maine, where Butterfield and Jones went to negotiate with Pike. Pike had met them in Boston, and had been willing to give some extension of the contract of January 29, upon another payment of $10,000. Butterfield and Jones, however, desired substantial change in the conditions and an extension to New Year's; and thereupon Pike said that he must consult his associates; and thus the negotiation must take place at Calais.

At Calais, the new contract was entered into July 31, 1883. Its first condition was that Butterfield was to pay Pike $25,000 "at the time of the agreement." And for this cash payment these two notes of Swift were lodged with

Pike: Jones assenting and acting with Butterfield in the whole negotiation, indorsing, and perhaps manually delivering, the notes to Pike.

Pike agreed to sell the mining property desired for $242,666; and to deposit, when requested by Butterfield, deeds of that property with the Union Trust Company of New York, there to remain till January 1, 1884, subject to Butterfield's right to take such deeds on payment of the balance of the purchase money, $217,666, and also of a further sum of $8,825 on some collateral account touching this business. (p. 49.)

Pike did so deposit his deeds, and paid the deposit fee.

Butterfield and Jones had left Calais promptly after July 31; and on August 25 Jones rejoined Gregory in London, and the two continued prosecuting the attempt to sell Pike's mine. Butterfield went to California to forward some part of the same enterprise; and so also did Kemp. In December all four were together again in London. And about this time, there returned to England one Walker, who in the interest of persons in England, willing to consider the question of purchasing this property, had been out to California and inspected it. Walker returned with an unfavorable report, and the prospect of a sale at immense profit at once darkened.

Thereupon Gregory determined to recover from Pike the return of these two notes which he held; and sent a messenger with a written demand for them dated December 13, 1883. (203.)

Butterfield made no payment, under his contract of July 31, either on January 1, 1884, or on any later day.

Pike, refusing to deliver the notes on Gregory's demand, allowed his deeds to remain on deposit over January 1, and withdrew them not till January 26, and not till he had been assured by Gregory that the balance of the purchase money would not be paid. (151.)

Nearly a year later a bill was brought by Gregory to recover possession of these notes, brought in Massachusetts where Pike voluntarily submitted himself to the jurisdiction. Out of that suit has arisen this one.

ARGUMENT OF FACTS.

I.

THAT PIKE IS AN INNOCENT PURCHASER.

Pike had no notice whatever that Gregory had any equity in these notes or in either of them. Gregory's name nowhere appeared upon them. He was not indorser nor indorsee, promissor nor promissee. The notes ran from Swift to Jones, and affected no one else. Jones was present engaged in selling the notes to Pike; and Pike had no occasion to inquire about him. About Swift's equity Pike did inquire; and got the satisfactory answer that Swift had no defence against the notes. (108.)

Gregory testifies to certain conversation between him and Butterfield early in July, 1883, in London; but there is no evidence or even pretence that any portion of such conversation ever reached Pike; still less that it reached him on or before July 31, in that year.

Pike's testimony is explicit: "I had no idea of any other ownership than that of Butterfield or Jones, and had no suspicion of any other ownership: particularly, I had n't the remotest idea that Mr. Gregory was directly or indirectly interested in the notes: that is, Mr. Gregory, the plaintiff in this case." (108.)

Furthermore, Butterfield testifies positively to his rightful authority to use the notes as he did in making them over to Pike. He says: "I had permission from Charles A. Gregory to use the notes at the time I pledged them to Pike." (31, *Ans.* 7). "When I left London, on the ninth of July, 1883, I asked Mr. Gregory if I should use the notes. He said that I might, if it became necessary, but I should cable him before doing so. I cabled him that it would be necessary to use the notes." (36, *Ans.* 37.) "I had authority to use those notes for the purpose they were used." (48, concluding sentence.)

The facts fully proven fully sustain these assertions of Butterfield. But there is no need to develop these facts in the present aspect of the case. The plaintiff's bill makes no allegation against Pike's right in law and equity to receive

these notes. Further, in orally addressing the court below, the plaintiff's counsel expressly conceded that Pike's receipt of these notes was rightful. If the evidence were to be fully examined, it would show not only that Pike was an innocent purchaser, but also that Gregory is not an innocent claimant.

II.

AS TO THE POINT THAT THE CONTRACT OF JULY 31, 1883, BECAME INOPERATIVE AND VOID BY REASON OF THE DECLINATION OF THE UNION TRUST COMPANY TO DELIVER TO SAID BUTTERFIELD THE BONDS OF THE MAY LUNDY COMPANY, AND REPORT THEREOF TO PIKE, WITHIN THIRTY DAYS AFTER JULY 31, AS PROVIDED IN SAID CONTRACT, AND THAT THE SAID PIKE THEREUPON CEASED TO HAVE ANY RIGHT TO RETAIN THE SAID SWIFT NOTE AS AGAINST BUTTERFIELD OR GREGORY.

All evidence tending in any way to show that the Union Trust Company did so decline to deliver such bonds comes from Butterfield. He testified: "They declined to give them to me, and Mr. Jones and Mr. Kemp, that were associated with me. It was at their office in New York City. It must have been somewhere from the third to the fifteenth of July that I called myself." [July afterwards corrected to August.]

Int. 11. "What notice, if any, did you give to Pike of the fact of the refusal of the Union Trust Company to deliver to you these May Lundy bonds, and how was this notice first communicated to him?"

Ans. "I first got Hall McAllister, of San Francisco, my attorney, to notify Pike by telegram: then I wrote a letter myself to Mr. Pike, telling him they would not give the bonds up under the contract he gave me, and that he must go to New York, as he agreed at the time of making the contract, and arrange with the company, so I could get the stock and bonds." (37, 38.)

Upon cross-examination, Butterfield testified as follows:—

Cross-Int. 49. "Did you demand the bonds from the Trust Company while you were in New York on your way from Calais to California, as you have stated?"

Ans. "Yes; I went to the Union Trust Company and they

said they had not been sent over from Morton, Bliss & Co., and they could not deliver them till they were delivered to them and Pike's deeds were sent on. I asked them if it would be all right, and they said it would as far as they knew. I went back to Morton, Bliss & Co.: Mr. Jones went with me, and they said there was eighteen hundred dollars more to be paid on them before they were to be sent to the Union Trust Company. Mr. Jones remained in New York to attend to that and I went to San Francisco."

Cross-Int. 52. "Did this refusal, which you have stated fully as made to you personally in New York, make it necessary or not [that is, for B. to communicate to P.]?"

Ans. "No, it did not: that refusal did not."

Cross-Int. 53. "Did you or not communicate that refusal to Pike?"

Ans. "No, I did not." (39, 40.)

Later Butterfield gave this testimony: —

Cross-Int. 56. "What refusal of the Union Trust Company to deliver those bonds did you communicate to Pike?"

Ans. "There were several communications: the telegram from McAllister and the letter from myself. Mr. Pike, on learning this, finally went to New York to the Union Trust Company, so Mr. Jones wrote me, and he could not arrange himself with them to give up the bonds. The only communications I made were the one through McAllister and the letter I wrote myself."

Cross-Int. 60. "What demand and refusal did you communicate to Mr. Pike?"

Ans. "The refusal that was made to Mr. Jones and Mr. Kemp, acting under power of attorney for me in this matter and other matters and all matters pertaining to the mining business."

Cross-Int. 61. "Was this demand upon the Union Trust Company made by both Jones and Kemp?"

Ans. "I instructed them both to make demands, and they both wrote me that they had."

Cross-Int. 62. "Did they make a joint demand, or was a demand made separately? Did you receive a letter from both about the same time?"

Ans. "I received several letters from them about the same time. I think Mr. Jones and Mr. Kemp went there together, and made a demand at the same time. And I telegraphed Mr. Jones to call on Mr. Pike to go with him, as he had agreed with us in Calais, as he was present at the time when Mr. Pike promised us if there was any difficulty in getting the bonds that he would go and get them. I know that Mr. Jones wrote me after that, that he had been there again to the Trust Company, and that it was impossible"; "that he could not get the bonds."

Cross-Int. 63. "Was this the demand and refusal that you communicated to Mr. Pike?"

Ans. "It was." (41, 42.)

Here, then, Butterfield definitely fixes upon a refusal of the Trust Company to deliver the bonds to Jones as the refusal communicated to Pike: a refusal of which Jones had the latest knowledge: a refusal made definite and final to Jones, and as such communicated to Butterfield by Jones.

It now becomes important to know when any demand upon the Union Trust Company in New York could have been made by Jones. Jones can best give information upon that point. And he testifies: "I arrived in London, I think, about the twenty-fifth day of August, 1883." (129.) There he stayed through September, October, and November and into December, as appears from his testimony on pages 130, 131. There is no claim of any demand as late as December if Jones were shown back to New York as early as in any portion of that month, as he is not. Any demand then made by Jones in New York, and communicated to Butterfield in San Francisco, must have been made before he took passage for London, where he arrived August 25; must have been made and communicated to Butterfield on or before August 18.

Now, of Butterfield's knowledge upon this matter down to the close of August, 1883, the case contains positive evidence. Charles N. Fox, of San Francisco, testifies in relation to Butterfield: —

Ans. "On the twenty-ninth day of August, 1883, he spent some time in the office"; "the question as to whom the deeds should run, which were to be made by Pike, Kellogg,

and myself, had been a subject of frequent discussion between us, and he had before that time instructed me to make our deeds run to himself, and on that day I remember asking him if he had instructed Pike on that subject, when he said he had not particularly instructed him, and I suggested that he ought to do so, as, if not otherwise instructed, Pike might make his deed run to the English company to whom Butterfield was seeking to sell the property. Thereupon he directed me to write a despatch to Pike, which I did, in the words following, to wit: —

SAN FRANCISCO, August 29, 1883.

Hon. F. A. PIKE, Calais, Me.

Make your deed to me, not to the Company.

This Butterfield signed in my presence and took it with him from the office."

"On August 30, 1883, Butterfield was again in my office," "when Butterfield told me that he had sent the despatch to Mr. Pike, which I had written and he had signed, the day before, and that that matter was all settled. He spoke confidently of being able to carry out his contract, and of this despatch as having been sent with that view." (208.)

Here, it must be noticed, that according to the terms of the agreement of July 31, 1883, between Butterfield and Pike, the former was not entitled to a return of the money previously paid, merely "in case the Union Trust Company decline to deliver the bonds." Upon such declining there was something more to be done by Butterfield, in order to affect Pike with the refusal. "The action of the Trust Company [was] to be ascertained and reported to said Pike within thirty days from date." (84, 85.) Thirty days from July 31, 1883: that is, on August 30, at latest.

And on the twenty-ninth day (not only of August, but also of the thirty days in which Butterfield was to notify Pike that the Trust Company would not deliver the May Lundy bonds) Butterfield was not notifying Pike of that refusal; but was communicating something of opposite tenor. Instead of informing Pike that the contract was at an end, he was directing Pike how to complete his (Pike's) part of it. He did not telegraph that Pike need not make any deed, as

the agreement was at an end. He did not direct Pike to restore the Swift notes; but to make his deed, and thus entitle himself to retain the Swift notes. "Make your deed," was Butterfield's direction to Pike on this twenty-ninth day.

And on the next, the thirtieth day, what was Butterfield's state of mind? Did he despair of the fulfilment of his contract? Not at all. Fox testifies: "He spoke confidently of being able to carry out his contract." Further, he spoke particularly of the Trust Company in connection with the delivery of the bonds. He "asked me [says Fox] if there was not some further notice which he was required to give Mr. Pike on that day, and I told him I knew of none, unless he was prepared to report the action of the Trust Company in the matter of delivering the bonds, to which he replied that he was not prepared to do that, for he did not know what the company would do about it." (p. 208.)

Here, then, was Butterfield, on the last day on which, under his agreement, he could effectively give notice to Pike that the Trust Company would not deliver the bonds, declaring that he could not give the notice, because he did not know the fact to be notified; "he did not know what the company would do about it."

Certainly he did not then know of a refusal. For (1) the conditions were not then (as will be pressed later) ripe for either performance or refusal; and (2) what information Butterfield then had pointed not to refusal but to performance. So he testifies: —

Cross-Int. 49. "Did you demand the bonds from the Trust Company while you were in New York, on your way from Calais to California, as you have stated?"

Ans. "Yes; I went to the Union Trust Company and they said they had not come over from Morton, Bliss & Co., and they could not deliver them till they were delivered to them, and Pike's deeds were sent on. I asked them if it would be all right, and they said it would so far as they knew." (39, 40.)

Here, then, was Butterfield, at the close of thirty days from July 31, not only ignorant of any refusal of the Union

Trust Company to deliver the bonds which he desired, but also in confident expectation that they would be delivered when that company should be in condition to deliver them. That is, when the Trust Company should have received the bonds; and when the deeds of Fox and Kellogg and of Pike should have been deposited with the Trust Company. And in this expectation Butterfield continued for some time after August 30, 1883; for he acted upon that expectation.

On August 29 he had directed Pike — not at once to deposit his deeds — but merely to make them run to a certain grantee — to himself. It was some weeks thereafter before he desired the deposit of the deeds of Fox and Kellogg. At Butterfield's request these deeds were held back till September 26; and then at his request forwarded for deposit. (See Fox's deposition, 210, *Ans.* 8, and Butterfield's request thereto annexed, 215.)

When he requested Pike to deposit his deeds, this case does not show. But Pike testifies that he did deposit them. (108, *Ans.* 2.) And this fact is established by agreement of parties. (151.) What was passing between Butterfield and Fox on August 30 makes it quite certain that such request was not made until after that date.

Thus it is plain that Butterfield, after the expiration of thirty days from July 31, was requesting the deposit of both sets of deeds, those from Fox and Kellogg and those from Pike. Not only was he then unknowing of any refusal of the Trust Company to deliver the bonds down to that time, certainly to September 26, but he had himself put it out of the power of the Trust Company to make any such delivery. He had held the deeds back from deposit; and he fails to show, and all the evidence in the case fails to show, that the bonds were ever placed in the possession of the Trust Company so that they could be delivered from their office. There could have been no such refusal prior to that time; and Butterfield was in no expectation of any such refusal to be made later, when the conditions of performance and refusal should be fulfilled.

And in this state of mind Butterfield continued after September 26, ignorant that any demand, in his behalf, for

those bonds had been refused by the Trust Company, and unexpectant that any such refusal would be made.

Fox testifies as to a period beginning about August 23: "I then saw him almost daily, and generally several times a day; always at my office, until the twenty-third of October." (207, *Ans.* 21.)

"And particularly he never gave me any notice that, or to the effect that, the Union Trust Company of New York had declined to deliver to him the bonds which are mentioned in the contract of July 31, as to be delivered to him by said company, and never intimated that said contract had been rendered void by the declining of said Trust Company to deliver to, or for, him such bonds. On the contrary, he told me many times during the months of September and October, 1883, that he had never applied to the Trust Company to deliver the bonds, and should not do so until he had straightened up" certain matters. (*Ans.* 7.)

When Butterfield was at the office of the Trust Company, in August, none of the deeds had been deposited there. None of them had been deposited there when Jones left New York for London, about August 18; and this state of things continued till September 26. Therefore, there could have been no refusal of the Trust Company before this last date.

And there was none thereafter. None communicated to Pike, certainly. For not only does Butterfield identify as the demand and refusal communicated by him to Pike a demand made by, and a refusal made to, Jones, that is, made in August, 1883; but also he swears positively that the demand which he talks about having made in New York, on his return to that city en route from California to London, was not communicated to Pike.

Cross-Int. 49. "Is this the demand and the refusal you communicated to Pike?"

Ans. "No, it is not." (42.)

Down, then, to September 26 there was no such demand and refusal as the bill sets up; for the conditions of performance and refusal had not then ripened. And if there had been previously such demand and refusal, Butterfield's action on that day in requesting Fox and Kellogg to deposit

their deeds would have been a waiving of it. Certainly, there was none later.

The action of the parties shows none, late or early. Where one would look for its recognition, it does not appear.

On December 13, 1883, this complainant Gregory took from Butterfield a written order on Pike to deliver the note now in question to Gregory. And this order contains no intimation even that Pike had failed to perform his part of the contract of July 31, or that the Trust Company had refused to deliver the bonds. It rests the right to a return solely on Gregory's property in the notes, as of the time of their delivery to Pike and as of the date of the order. (203.) And this latter ground has been since abandoned.

In January, 1884, this complainant himself made a personal demand upon Pike for this and the other note. He narrates the interview himself, and no mention whatever is made of any intimation made by him to Pike, of any failure on Pike's part to perform his contract, or of any action of the Trust Company which made it unlawful or inequitable for Pike to retain those notes. And yet, as Gregory himself states the conversation, Pike said to him that which forbade Gregory to hold back any knowledge which he then had of such failure, or of such demand and refusal. Pike said those notes "were forfeited to him by the contract of July 31, 1883," "under the terms of that contract." (59, *Ans.* 4.) And this assertion of rightful retainer on the part of Pike, Gregory met with no denial. He contented himself, then and there, with setting up that Pike had no right to receive the notes. (*Ans.* 3 and 4).

And Gregory, long after that time, declined to assert such failure of the Trust Company to deliver the bonds, even in a judicial examination of his right to these notes, where he was expressly inquired of on that point: that is, in the so-called arbitration of Hon. E. R. Hoar, late in 1886, Gregory states the fact himself. He says, the arbitrator "read to us the clause referring to the fact that non-delivery to Butterfield of the May Lundy bonds would render the agreement void, and asked us if we had any evidence on that subject: he stated that it was a very important point, and wanted to

know if we were prepared on that point. We said we had no evidence then to offer on that point, and did not then rely upon it at that hearing." (68.)

This complainant has at other times declined to assert such failure. He has testified as a witness in this controversy more than once; and he has never mentioned as a fact coming to his knowledge a refusal of the Trust Company to deliver these bonds. And not only has Gregory testified without mentioning such refusal; but so also have the other two partners with him and Butterfield, in the scheme to purchase this mining property from Pike: that is, Jones and Kemp. Their testimony is now in this case, and it mentions no such refusal.

Is not this passing strange? The whole agreement of July 31, 1883, came to naught within thirty days after its making; and yet Gregory, Jones, or Kemp, three out of the four partners to one side of that contract, never heard a word about it at the time.

The fact is, nobody ever heard of it till after Pike's death. Nay, more, while Pike lived, agreement was reached between him and Gregory on this subject; and that agreement is still in force in this case: agreement that Pike never was notified of any such refusal. (150.)

There was no such refusal. There was nothing which prevented either Pike or Fox and Kellogg from depositing their deeds when Butterfield called for them. He did call for them; and they remained on deposit until after January 1, 1884. The Union Trust Company did not decline to deliver the bonds of the May Lundy Company to Butterfield, and there is no pretence that Fox and Kellogg did not become parties to the agreement of July 31, 1883.

Thus, Pike not only rightfully received these notes, but also he has had hitherto, and now has in fact, the right to retain them, in order to make good to himself the sum of $25,000 due to him on July 31, 1883.

II.

THE COMPLAINANT'S SECOND POINT RESTS HIS TITLE TO THE PROCEEDS OF THIS NOTE UPON A SUBMISSION OF THE

QUESTION OF PROPERTY IN SAID NOTE, AS BETWEEN HIM AND THE ORIGINAL DEFENDANT, FREDERIC A. PIKE, TO THE ARBITRATION OF HON. E. R. HOAR, AND AN AWARD BY HIM IN THE COMPLAINANT'S FAVOR.

In that relation, these are facts: —

(1) The submission was of a suit then pending in the Circuit Court of the United States for the District of Massachusetts, and which had then been set down for hearing in said court. (87.) And yet no rule of that court authorizing such submission is shown, or exists. (87.)

(2) In that suit then pending in the Circuit Court, there was another claimant of one of the notes in controversy besides this complainant Gregory; and he was not a party to the submission. (219.)

(3) Said submission was made without the authority of the defendant, Frederic A. Pike, then living.

(4) The submission itself provided the manner in which the arbitrator should make a final and valid award. This was to be done by a delivery of the notes: "said notes shall be by said referee passed over to whichever of said two parties shall, in his judgment, be entitled thereto." (87.) And said notes were never so delivered. On the other hand said notes were by agreement of parties, before any such delivery, taken out of the hands of the arbitrator, and otherwise disposed of. (218.)

(5) This power of the arbitrator to make a final award by manual delivery of the notes was essentially modified in the very act of the notes passing into his hands. He was not so to deliver them until the court had determined the right of a third party. (219, *Ans.* 7.) Such determination was not made.

(6) No final award was made even in writing. None such was made on December 18 (R. p. 217.); and both parties were to be heard after that day before the award should be made final. They were not so heard, and the award took no final shape, and was not published or delivered to either of the parties, until the submission had on the morning of that day been revoked; nor until later on that same

day, the submission had been revoked by both parties: by their taking the notes out of the hands of the arbitrator.

Therefore, it was not delivered by way of publication as a valid award; but as a paper no longer valuable to be retained. (218.)

(7) Said submission was revoked by the death of the defendant Pike, during the hearing. (216, 221.)

(8) It was revoked in writing by this defendant, as executrix of said Frederic A., on December 24, 1886, before any final award had been made in said case. (16, 18, 218.)

IV.

There is, however, an attempt to maintain that according to the terms of the agreement of July 31, 1883, Pike was not entitled to retain the Swift notes which were in his possession: that is, to retain them after January 1, 1884, even if the Union Trust Company had not declined to deliver the bonds as provided in the contract, and also if on that day Butterfield had failed to complete his payment; had made no further payment whatever.

The facts mingled with some propositions of law bearing on this question are as follows: Butterfield agreed to pay Pike $25,000, upon the execution of the agreement of July 31, 1883. The words of that agreement made that sum payable "at the time of this agreement." (48.) Pike's signature to the agreement was the whole consideration for that sum; and as soon as he had made that signature and that sum had been paid to him, the money so paid became absolutely his, without any further performance whatever. It was agreed to be paid to bind the bargain: as earnest money. And as such it belonged to Pike absolutely.

Not money, but notes were delivered to Pike; and Butterfield retained a right to redeem those notes till January 1, 1884. He did not, however, exercise this right; and it is now as though it had never existed. A right to redeem affects the absoluteness of title only for the purpose of redemption; otherwise, it has no effect.

When Butterfield's right of redemption was gone, the notes became Pike's absolutely for the purpose of their original deposit: that Pike might raise out of them $25,000. The word "forfeited" is here used not in its technical sense, as a term of the criminal law; and is not subject to the strict construction which such use would impose. It is here used merely to corroborate the civil right to retain money paid to bind a bargain; earnest money: a right akin to that of a mortgagee to retain partial payments after final foreclosure.

The notes were long notes: the shortest not becoming payable for nearly sixteen months: and the other and larger, a year later. Pike's authority to collect them, which came to him by indorsement and delivery, for a valuable consideration, could not be exercised until nearly May, 1885 and 1886, respectively. To enable him to realize what was due on these notes before those distant dates, he was specially authorized, after Butterfield's right of redemption had expired: after January 1, 1884, "at that time" "to raise $25,000 out of them by pledging them on the most favorable terms he can obtain."

Except as hereafter to be suggested this special authority granted to Pike is unlimited in time: and may be exercised now. That is, whatever damage the party entitled to the surplus arising out of these notes after Pike's claim is satisfied, can show that he has suffered by the course actually pursued with these notes, over and above what he would have suffered from their being pledged, Pike can make good to that party. This would be full performance of the duty to pledge if there were such duty incumbent on Pike as a condition precedent to the enjoyment of his right.

But there is a limitation in time which must have been in the minds of these parties. Pike can never have desired the privilege of pledging those notes to be exercised after they or either of them had become payable and could be collected in full. And Butterfield can never have consented that that privilege should be exercised in preference to a speedy collection. When the notes should become collect-

ible. Pike desired no liberty to pledge; and certainly he would never have consented to hamper himself with the duty to pledge as the sole means of realizing out of those notes. When the time came for collecting the contents of these notes, this provision for pledging lost all its force and became obsolete, as against Pike's authority to collect in full. Also, as against Swift's right to take up the notes on payment in full.

This provision is admitted to have had no force at any time against Eaton's right to be paid, and of course against Pike's duty to pay Eaton. For this purpose Pike might proceed to collect the notes. The arbitrator so found. But if Pike had lawful authority to collect the notes at all, how could his lawful collection of the notes take away his right to payment out of the proceeds?

The question whether these notes were deposited in payment of, or as collateral security for, the sum of $25,000 is not open to the plaintiff, Gregory, upon his pleadings. In his bill he sets up an avoidance of the contract "by reason of the declination of the Union Trust Company of New York to deliver to said Butterfield the bonds of the May Lundy Company." (R. p. 2.) But by the terms of the agreement such avoidance affected nothing but "money paid." (R. p. 50.) Nothing but "the money paid shall be returned to said Butterfield."

If these notes are money paid for the purpose of being returned, they must also be money paid for the purpose of being retained or forfeited. (R. p. 49.)

The condition of return never having been fulfilled; and on the other hand, the condition of retention or forfeiture having occurred, the right of retention attaches, even on the pleading of the plaintiff.

The further fact is, that both parties treated the delivery of these notes as payment. Butterfield requested the deposit of Pike's deeds; and Pike deposited them as though the first payment called for by the contract had been made. And this action agrees with the recital of the parties in writing in these words: "For the first payment of $25,000, specified in the above agreement, the said Butterfield has

lodged in the hands of said Pike the notes of W. C. N. Swift." (p. 50.)

It plainly appears that these notes were thus lodged, and this underwriting made on the contract before the order was given Pike to pay the Eaton note. The order itself so recites. The language, then, of the indorsement governs the interpretation of the language of the order. Thus the words "as collateral" are not to be carried forward into the second branch of the proposition. Pike is to hold the notes not "as collateral for the payment": but "for the payment": that is, in payment.

This aside, however, it is then perfectly clear, at worst against Pike, that his right to the notes for his own payment is exactly the same with his right to those notes for Eaton's payment. The order puts both rights of Pike upon the same level. And Pike's acceptance secures to his own right a preference. Eaton is not to be paid till after Pike is paid. (p. 109.)

THOMAS H. TALBOT.

Solicitor for Mary H. Pike.

Office Supreme Court U.S.
FILED,
APR 12 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 292.

GREGORY

vs.

BOSTON SAFE DEPOSIT COMPANY ET AL.

SUPPLEMENTARY BRIEF FOR MRS. PIKE.

The decision below is reported
36 Fed. Rep. 408.

Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 192.

GREGORY *v.* BOSTON SAFE DEPOSIT COMPANY ET AL.

SUPPLEMENTARY BRIEF FOR MRS. PIKE.

1. The plaintiff, by intrusting Butterfield with the notes, gave him an ostensible authority to deal with them, and cannot set up his title against a *bona fide* purchaser or pledgee for value.

Butterfield being about to go to Europe, the new notes, which Swift gave in exchange for those held by Butterfield, were, for convenience, made to Jones.

At Swift's request the notes were made non-negotiable, in order that the agreement that he should have an extension of time, if he wished it, might be binding on any holder of the notes.

The fact of non-negotiability is immaterial in this case. The equities to which a note overdue or for other reasons is not negotiable are only the equities between the parties to the note, *i. e.*, those between Swift and Jones, and not those between others, such as Gregory and Jones.

"The maxim that where one of two innocent parties must sustain a loss from the fraud of a third such loss should fall upon the one whose act has enabled such fraud to be committed is applicable to such cases."

Jones, Pledges, § 135.

It is, therefore, well settled that where the owner of any *chose in action*, negotiable or not, has clothed another with the apparent title he is bound by his acts towards *bona fide* transferees of the *chose in action*. This applies to certificates of deposit, certificates of shares, etc., as well as to chattels. Mere possession of chattels is not

enough, but possession by a defeasible title, or with an ostensible title, is; and a note bears on its face the evidence of title.

Story, Prom. Notes, § 178.
Pomeroy, Remedies, §§ 156 to 163.
Moore v. *Metropolitan Bank*, 55 N. Y. 41.
Combes v. *Chandler*, 33 Ohio St. 178.

The last two cases contain very full discussions of the subject.

Calais Steamboat Co. v. *Van Pelt*, 2 Black, 372.

2. Gregory did, in fact and with intent, clothe Butterfield with power to sell or pledge these notes.

They were put into his hands for the use of the partnership, of which Gregory was a silent member, everything being done in the names of Butterfield and Jones.

The very receipt which Butterfield gave (page 228), promising to return the notes or account for the proceeds, gives him power to sell or pledge the notes, subject to a duty subsequently to account for the proceeds, if he makes use of the power. But this duty is a relation merely between Gregory and Butterfield; and does not affect the rest of the world.

Story, Bailments, § 439.
Hurd v. *West*, 7 Cowen, 752.

In the analogous cases of sales, which a plaintiff maintains to have been conditional, if it appears that the condition was to return the goods or their proceeds, the plaintiff is precluded from reclaiming the goods themselves from a purchaser or pledgee.

Holbrook v. *Armstrong*, 10 Maine, 31.
Dearborn v. *Turner*, 16 Maine, 17.
Crocker v. *Gulliver*, 44 Maine, 491.
Perkins v. *Douglass*, 20 Maine, 317.

So where goods are forfeited to the United States the title is absolute in the United States, and no purchaser can hold them; but if the statute forfeits the goods or their proceeds, the Government cannot take the goods from a purchaser for value.

Caldwell v. *United States*, 8 How. 366.

It will not be denied that Pike was a *bona fide* purchaser or pledgee for value and without notice.

Pike's deposition. See our brief on the facts.

3. The cablegram of the plaintiff, p. 104, is an express authority to use the notes, even if there were no other. He says that if the notes are used his interest in the adventure must be enlarged.

This is necessarily a condition subsequent, and there is evidence that it was complied with. JONES, pp. 129, 130, Ans. 22: "I made an arrangement to give him one hundred thousand dollars out of my individual interest in the sale of the mining properties we were all interested in, and he to give his hearty co-operation in prosecuting the sale."

In the succeeding answers he follows up this statement, as applied to the contract of July, 1883. If not, he could have enforced compliance. It is, however, a condition which cannot affect Pike.

4. If it should be argued that the contract was defeated by a refusal of the Union Trust Company duly notified to Pike to deliver certain bonds, or by a failure of Fox & Kellogg to deposit certain deeds, we answer by the stipulation made while Pike was living, p. 150.

"It is also agreed that Fox & Kellogg, named in the contract of July 31, 1883, made and deposited the deeds of their interest in said mines in accordance with the terms of the contract.

"It is further agreed that the defendant Pike was never notified in regard to any action had or taken by the Trust Company, as provided in said contract of July 31, 1883, that he should be notified of within thirty days."

5. The plaintiff having an interest of one eighth in a scheme of floating the mines on the London market at $5,000,000, more than twenty times the cost of the mines to the partners, knew, from the cablegram, that his notes were likely to be used, and knew, by a letter from his brother, dated August, 1883, p. 205, and by Jones statement to him in London, also in August, p. 129, that this note had been used, and made no sign until the scheme had failed.

No wonder that Pike, in answer to Mr. Brooks's question, Cross-Int. 38, p. 117, if he was not astonished when he received the order

to deliver the notes, and a statement that they were Gregory's notes, when deposited with him, answers, p. 118: "My feeling about that was, when they were presented, that the mining sale had failed in London, and that Gregory and Butterfield had combined to do me out of those notes."

6. The submission to Judge Hoar purports to be a submission of the cause then pending in this court, and refers to and necessarily makes it a part of the submission.

In that cause there were other parties beside Gregory and Pike, and a submission of the cause, whether by rule of court or otherwise, without the assent of those parties, was irregular and void.

"If a submission be entered into as a pending cause, or if a reference is undertaken to be made by agreement of parties, all persons who are parties of record to the suit must unite equally, whether they are mere nominal parties or really interested."

Morse, Arbitration, p. 33, citing.
Owen v. *Hurd*, 2 Term, R., 643.

The plaintiff may cite certain decisions which hold that an attorney may refer his client's cause to arbitration. But in every case which we have seen there was, in fact, a rule of court, and we submit that the power is to enter into a rule of court. If the parties had applied to this court for a rule, it is clear, as we have shown, that they would have been required to obtain the consent of the other parties.

To attempt to change the possession of the notes from Pike to Gregory by a submission and award was (though not so intended) likely to work an injury to Kemp Van Ee, who claimed a lien on one of them in the hands of Pike, and might lose his remedy by these transfers to Gregory. He was more than a nominal party.

This case, in equity, is not open to that objection, because the notes have been paid, and the proceeds are in the registry of the court wherein the suit is brought, and all that Gregory asks by this bill is, that his right as against Mr. Pike may be decided; to which Mrs. Pike makes no objection, knowing that the court will guard the rights of third persons.

This point occurred to Mr. Talbot, and, in the presence of Gregory, with his implied consent, he stated to Judge Hoar that there was in

the suit another claimant besides Gregory (meaning Kemp), and that his rights must be protected, to which Judge Hoar assented. p. 219.

This was a valid modification of the submission. A written submission may be orally modified.

See

Morse, p. 82.
Woods v. *Page*, 37 Vt. 252.
Loring v. *Alden*, 3 Met. 576.

After this notice and assent, it was necessary that either Kemp should become a party to the reference or that his rights should be determined in some mode before the award should become binding.

Either, therefore, the submission is void in not including Kemp, or, if modified, the so-called award is not complete and binding, for no such arrangement was made.

7. If the submission had, by modification, or however otherwise, once become valid, it was revoked by Mr. Pike's death.

Morse, Arbitration, page 233: "The most familiar case in which it (revocation in law) takes place is where one of the parties to the submission dies pending the arbitration; as a general rule this occurrence is a revocation of the arbitrator's authority."

Marseilles v. *Kempton*, 17 Penn. St. 238.

We believe that no case can be found in which an attorney, knowing his client was on his deathbed, is held to have power to bind his executors.

In this case the parties, of their own motion, appealed to Pike for his consent, and did not obtain it. It is not for Gregory now to say that it was unnecessary.

8. But it is said that Mrs. Pike ratified the submission.

We have found no case which holds that an executor can enter into an arbitration *before probate*. The will was proved March 1, 1887, more than two months after the whole matter was concluded.

Besides, Mr. Pike had been acting for other parties, and was known to Gregory to be so acting; and the supposed ratification

expressly says that Mr. Harvey has not been able to consult all of them.

A submission by an executor is, in many cases, an admission of assets, and that he should have the power before probate is quite inadmissible.

9. It is admitted and is obvious that Mrs. Pike has as much power to revoke as to ratify the submission; and she did revoke in due season.

A submission not under rule of court may be revoked at any time before it has become binding upon the parties.

Vynior's Case, 8 Rep. 81 b.
Green v. *Pole*, 6 Bing. 443.
Mills v. *Bayley*, 2 Hurlst. & C. 36.
Randell v. *Thompson*, 1 Q. B. D. 748.
Tobey v. *Bristol*, 3 Story, R. 800.
Allen v. *Watson*, 16 Johns. 205.
Wallis v. *Carpenter*, 13 Allen, 19.

This power is now regulated by statute in many States, but there is no statute in Massachusetts affecting submissions *in pais* in that particular.

Boston & Lowell R. R. Co. v. *Nashua & Lowell R. R. Co.*, 139 Mass. 463; a case in which Mr. Brooks was of counsel, and one very similar to this in its facts.

That the award was not completed so as to be irrevocable is perfectly clear upon the uncontradicted evidence of Mr. Talbot. If he had misunderstood or forgotten the facts, he could have been controlled by Judge Hoar.

The award was drawn up by Mr. Brooks, upon a sudden emergency, and signed by Judge Hoar, in order that it might be ready, under certain circumstances, if both parties should find it to be necessary to use it, and should not wish to be heard further upon it. The circumstances never required it; and Judge Hoar had been notified in writing that the parties wished to be heard further, and had assented.

Judge Hoar, in substance, stated that the award as drawn was not

complete. When the revocation was handed to him, he accepted it as valid, and said that he could not now make any alteration in the imperfect and unfinished award, and did not wish to be paid any fees, as the case before him had come to naught. p. 218.

This action and these words corroborate in the most striking manner our view, and are, indeed, quite decisive of the point.

It is probable that important modifications would have been made, and it is certain that Kemp Van Ee's rights would have been in some way provided for.

10. The *opinion* of Judge Hoar is undoubtedly of great weight, and we have the highest regard for it. But it does not appear whether the case presented to him was the precise case here shown. Though it must have been in substance very similar, some slight but important additional evidence is now offered. But, above all, the opinion of Judge Hoar is in our favor as to one part of the case, which necessarily involves our whole case. He gives Eaton a lien on the notes, and Eaton's title is derived from the same persons, and at the same time, and under the same circumstances as ours, and is, by its terms, subordinate to ours. It is impossible that Eaton's title should be good and ours bad.

We cannot undertake to account for the opinion. It has been suggested that Judge Hoar considered that the power to pledge the notes must be strictly construed, and that as Pike had not pledged them the power was gone. This would, of course, be unsound; but as Eaton could not exercise this power, he could not be held responsible for the failure to exercise it; and this is the only possible difference between him and us. It is unsound, of course, but it will be difficult to explain the opinion on any other theory.

It is provided by the contract, page 49, that in case of failure by Butterfield to make the payments in full by Jan. 1, 1884, the money previously paid shall be forfeited; and in the supplement to the contract, page 50, the notes are transferred instead of the first payment, but, as they exceed the amount of $25,000, the agreement is not for a forfeiture, but for a right to raise the $25,000 by pledge if they are not redeemed before Jan. 1.

If nothing were said about forfeiture, so called, which is really